

case.¹⁶⁷ Meanwhile, the Seventh Circuit held that rather than determining whether *Heck* applies, district courts should address the merits of the case.¹⁶⁸

Unlike the Seventh and Ninth Circuits, the Third Circuit recently held in *Garrett v. Murphy* that a plaintiff does not fail to state a claim only by not meeting pleading requirements.¹⁶⁹ Courts that dismiss suits for failing to meet the favorable termination requirement of *Heck* dismiss due to a lack of a valid “cause of action” under § 1983; “claim” under the PLRA is synonymous with “cause of action.”¹⁷⁰ The Third Circuit noted that the tort of malicious prosecution, the basis for the Supreme Court’s holding in *Heck*, requires favorable termination as an element of the claim.¹⁷¹ Similarly, therefore, favorable termination is “an implied element of a [§ 1983] claim,” so a dismissal for failure to state a claim constitutes a strike under the PLRA.¹⁷² Furthermore, the Third Circuit distinguished *Heck*-barred claims from failure to state a claim under 12(b)(6) because its precept required court to dismiss *Heck*-barred claims *sua sponte* for lack of subject-matter jurisdiction at any point during litigation.¹⁷³ Moreover, the court rejected the affirmative defense approach adopted by the Ninth Circuit by asserting that favorable termination is not an exhaustion defense; the Supreme Court did not require defendants to prove the validity of a conviction in their pleadings in *Heck*.¹⁷⁴

¹⁶⁷ 833 F.3d at 1056.

¹⁶⁸ *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011).

¹⁶⁹ 17 F.4th at 427.

¹⁷⁰ 17 F.4th at 427.

¹⁷¹ 17 F.4th at 428.

¹⁷² 17 F.4th at 428-429.

¹⁷³ 17 F.4th at 428.

¹⁷⁴ 17 F.4th at 429 (citing 512 U.S. at 483-487).

Applicant Details

First Name	Laila											
Last Name	Ujayli											
Citizenship Status	U. S. Citizen											
Email Address	lujayli@jd24.law.harvard.edu											
Address	<table><thead><tr><th>Address</th></tr></thead><tbody><tr><td>Street</td></tr><tr><td>1654 Massachussets Ave, Unit 62</td></tr><tr><td>City</td></tr><tr><td>Cambridge</td></tr><tr><td>State/Territory</td></tr><tr><td>Massachusetts</td></tr><tr><td>Zip</td></tr><tr><td>02138</td></tr><tr><td>Country</td></tr><tr><td>United States</td></tr></tbody></table>	Address	Street	1654 Massachussets Ave, Unit 62	City	Cambridge	State/Territory	Massachusetts	Zip	02138	Country	United States
Address												
Street												
1654 Massachussets Ave, Unit 62												
City												
Cambridge												
State/Territory												
Massachusetts												
Zip												
02138												
Country												
United States												
Contact Phone Number	6147079157											

Applicant Education

BA/BS From	Ohio State University-Columbus
Date of BA/BS	May 2018
JD/LLB From	Harvard Law School
	https://hls.harvard.edu/dept/ocs/
Date of JD/LLB	May 25, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Harvard Civil Rights-Civil Liberties Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Upper Level Ames Moot Court Competition

Bar Admission**Prior Judicial Experience**

Judicial Internships/
Externships **No**
Post-graduate Judicial Law
Clerk **No**

Specialized Work Experience

Recommenders

Fallon, Richard
rfallon@law.harvard.edu
617-495-3215
Modirzadeh, Naz
nmodirzadeh@law.harvard.edu
617-495-1066
Jenkins, Alan
ajenkins@law.harvard.edu
646-312-9278
Stearns, Ian
ian.stearns@usdoj.gov
(617) 748-3208

This applicant has certified that all data entered in this profile and any application documents are true and correct.

LAILA UJAYLI

lujayli@jd24.law.harvard.edu | (614) 707-9157 | 1654 Massachusetts Ave Unit 62, Cambridge, MA 02138

June 12, 2023

The Honorable Jamar K. Walker
District Judge
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to apply for the next available clerkship in your chambers beginning in 2024. I am a rising third-year student at Harvard Law School, where I am an executive managing editor of the *Harvard Civil Rights-Civil Liberties Law Review* and co-president of Harvard's Middle Eastern and North African Law Students Association. I would be especially excited to clerk on the District Court for the Eastern District of Virginia given the speed and intensity of the docket.

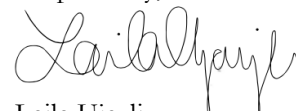
Enclosed please find my resume, writing sample, law school transcript, undergraduate transcript, and graduate transcripts corresponding with my master's degrees in Film Aesthetics and Public Policy from the University of Oxford, where I studied as a Rhodes Scholar. The following people will be submitting letters of recommendation separately:

- Prof. Richard Fallon; Harvard Law School; rfallon@law.harvard.edu; (617) 495-3215
- Prof. Alan Jenkins; Harvard Law School; ajenkins@law.harvard.edu; (617) 998-1741
- Prof. Naz Modirzadeh; Harvard Law School; nmodirzadeh@law.harvard.edu; (617) 495-1066
- Ian Stearns; Assistant U.S. Attorney; ian.stearns@usdoj.gov; (617) 748-3208

While in law school, I have pursued hands-on litigation experience in both civil and criminal law – providing timely legal research and analysis at D.C.-area law firms both summers and at the Boston United States Attorney's Office during the spring of my second year. I have further cultivated my research and writing skills through journal work and an independent writing project. I would be honored to contribute those skills to the important work of your chambers – and eager to learn from you to further develop them.

I am happy to provide any additional information that would be helpful to you. Thank you for your time and consideration.

Respectfully,



Laila Ujayli

LAILA UJAYLI

lujayli@jd24.law.harvard.edu | (614) 707-9157 | 1654 Massachusetts Ave Unit 62, Cambridge, MA 02138

EDUCATION

HARVARD LAW SCHOOL, Cambridge, MA

J.D. Candidate, May 2024

Honors: Paul and Daisy Soros Fellowship for New Americans

Activities: *Harvard Civil Rights-Civil Liberties Law Review*, Executive Managing Editor of Outside Articles
Harvard Middle Eastern and North African Law Students Association, Co-President
Harvard International Human Rights Clinic, Fall 2022 – Winter 2023
Harvard Upper-Level Ames Moot Court Competition, Qualifying Round
The Appellate Project, Class of 2022-2023

UNIVERSITY OF OXFORD, Oxford, UK

Master of Public Policy with Distinction, October 2021

Master of Studies with Distinction in Film Aesthetics, August 2020

Honors: Rhodes Scholar

THE OHIO STATE UNIVERSITY, Columbus, OH

B.S. *summa cum laude* and Phi Beta Kappa with Honors in International Relations & English, May 2018

EXPERIENCE

UNITED STATES DEPARTMENT OF STATE – OFFICE OF THE LEGAL ADVISER, Washington, D.C.

Winter 2024

Extern

COVINGTON & BURLING LLP, Washington, D.C.

Summer 2023

Summer Associate

Draft research memo offering legal support to exclude timing advance data and geofence evidence for a criminal defense matter. Profile Eleventh Circuit judges and relevant decisions for an oralist for an upcoming en banc hearing. Prepare research memo assessing the mechanisms for determining a living wage for a dispute at the OECD's National Contact Point.

UNITED STATES ATTORNEY'S OFFICE – DISTRICT OF MASSACHUSETTS, Boston, MA

Spring 2023

Clinical Intern, Securities, Financial, and Cyber Fraud Unit

Provided timely research to trial team during prosecution of Russian businessman Vladislav Klyushin for his involvement in a \$90 million securities fraud & hacking scheme. Prepared research memos on establishing venue in interstate conspiracies, restorative justice principles at sentencing, legislative history of stalking laws, and more. Drafted portions of sentencing memo. Viewed First Circuit oral arguments.

AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C.

Summer 2022

Strauss Diversity and Inclusion Scholar

Researched questions of First Amendment law for client's amicus brief on behalf of respondents in *303 Creative, LLC v Elenis*. Prepared presentation advising European maritime client on Russia sanctions compliance. Advised client on obtaining a license from the Office of Foreign Assets Control. Conducted interviews and drafted declarations in support of asylum applications.

INKSTICK MEDIA, Washington, D.C. (remote)

November 2020 – February 2022

Associate Editor

Investigated and edited scripts for stories on foreign policy and national security for podcast *Things That Go Boom*. Reviewed submissions, edited pieces, and provided fact-checking and research support for online outlet. Solicited commissions from new contributors, particularly underrepresented voices, to broaden readership and bring fresh insights into national security debates.

UN UNIVERSITY CENTER FOR POLICY RESEARCH, New York, NY (remote)

Summer 2021

Research Assistant

Analyzed language and designation criteria of over 100 UN sanctions resolutions for a project examining the impact of UN sanctions on humanitarian action. Organized and conducted webinar for humanitarian actors interviewed for the project and categorized responses. Utilized findings to draft a case study on the impact of UN sanctions on humanitarian action in Somalia.

WIN WITHOUT WAR, Washington, D.C.

September 2018 – June 2019

Herbert Scoville Jr. Peace Fellow

Drafted report analyzing the federal security budget and recommending actionable steps to direct spending towards conflict prevention and diplomatic engagement. Created policy briefs and drafted hearing questions for members of Congress on a range of foreign policy issues.

PERSONAL

Screenwriter selected as a 2021 CineStory Foundation Feature Fellow and featured on Coverfly and The Tracking Board's 2021 Next List of the strongest emerging writers across film and television. Serve on the Board of Directors for the Herbert Scoville Jr. Peace Fellowship.

Harvard Law School

Date of Issue: June 7, 2023

Not valid unless signed and sealed

Page 1 / 2

Record of: Laila Ujayli

Current Program Status: JD Candidate

Pro Bono Requirement Complete

JD Program				8021	International Human Rights Clinic	H	3
Fall 2021 Term: September 01 - December 03					Farbstein, Susan		
1000	Civil Procedure 1	P	4	2212	Public International Law	H	4
	Rubenstein, William				Modirzadeh, Naz		
				Fall 2022 Total Credits:			13
1001	Contracts 1	H	4	Fall-Spring 2022 Term: September 01 - May 31			
	Okediji, Ruth						
1006	First Year Legal Research and Writing 1B	H	2	2103	Government Lawyer	H	2
	Havasy, Christopher				Whiting, Alex		
1003	Legislation and Regulation 1	P	4	7002W	Independent Writing	H	2
	Tarullo, Daniel				Modirzadeh, Naz		
1004	Property 1	P	4	3500	Writing Group: Public International Law; International Law and	CR	1
	Mann, Bruce				Armed Conflict; International Law and War		
Fall 2021 Total Credits:				18	Modirzadeh, Naz		
Winter 2022 Term: January 04 - January 21				Fall-Spring 2022 Total Credits:			5
1052	Lawyering for Justice in the United States	CR	2	Winter 2023 Term: January 01 - January 31			
	Gregory, Michael			8021C	International Human Rights Clinic - Advanced Clinical	H*	2
Winter 2022 Total Credits:				2	Farbstein, Susan		
Spring 2022 Term: February 01 - May 13					* Dean's Scholar Prize		
1024	Constitutional Law 1	H	4	Winter 2023 Total Credits:			2
	Eidelson, Benjamin						
1002	Criminal Law 1	H	4	Spring 2023 Term: February 01 - May 31			
	Yang, Crystal						
1006	First Year Legal Research and Writing 1B	H	2	2079	Evidence	P	3
	Havasy, Christopher				Clary, Richard		
3011	Framing, Narrative, and Supreme Court Jurisprudence	H	2	8017	Government Lawyer: United States Attorney Clinic	H	4
	Jenkins, Alan				Whiting, Alex		
1005	Torts 1	H	4	2051	Race and the Law	H	4
	Gersen, Jacob				Jenkins, Alan		
Spring 2022 Total Credits:				16	Spring 2023 Total Credits:		
Total 2021-2022 Credits:				36	Total 2022-2023 Credits:		
Fall 2022 Term: September 01 - December 31				2050	Criminal Procedure: Investigations	~	4
2035	Constitutional Law: First Amendment	P	4	2973	Whiting, Alex		
	Fallon, Richard				Foundations of International Arbitration: Theory and Practice	~	2
2510	Human Rights Advocacy	H*	2	2517	Sobota, Luke		
	Farbstein, Susan				Islamic Law and Human Rights	~	1
	* Dean's Scholar Prize			2169	Waheedi, Salma		
					Legal Profession: Collaborative Law	~	3
					Hoffman, David		

continued on next page

Harvard Law School

Record of: Laila Ujayli

Date of Issue: June 7, 2023

Not valid unless signed and sealed

Page 2 / 2

3108	The Supreme Court as a Lawmaking Institution Fallon, Richard	~	2
		Fall 2023 Total Credits:	12
	Spring 2024 Term: January 22 - May 10		
2086	Federal Courts and the Federal System Fallon, Richard	~	5
		Spring 2024 Total Credits:	5
		Total 2023-2024 Credits:	17
		Total JD Program Credits:	84
End of official record			

HARVARD LAW SCHOOL
 Office of the Registrar
 1585 Massachusetts Avenue
 Cambridge, Massachusetts 02138
 (617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~  
**In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.**  
 ~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
 LL.M. (Master of Laws)
 S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

May 2011 - Present

<i>Summa cum laude</i>	To a student who achieves a prescribed average as described in the <u>Handbook of Academic Policies</u> or to the top student in the class
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipient(s)
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67 (B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

<u>1969 to June 1998</u>	<u>General Average</u>
<i>Summa cum laude</i>	7.20 and above
<i>Magna cum laude</i>	5.80 to 7.199
<i>Cum laude</i>	4.85 to 5.799

June 1999 to May 2010

<i>Summa cum laude</i>	General Average of 7.20 and above (exception: <i>summa cum laude</i> for Class of 2010 awarded to top 1% of class)
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipients
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.

The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Adrienne Bricker
Adrienne Bricker
University Registrar

THE OHIO STATE UNIVERSITY TRANSCRIPT



Name: Laila Ujayli
Student: 200398392
DOB: 08/30/****
Print Date: 03/06/2023
Page 1 of 2
OSUOF

LAILA UJAYLI
LUJAYLI@JD24.LAW.HARVARD.EDU

Institutions Attended
Columbus School For Girls

OSU Degrees Awarded

Degree: Bachelor of Science
Confer Date: May 6, 2018
Degree Honors: Summa Cum Laude
Degree Honors: with Honors in the Arts and Sciences
Degree Honors: with Honors Research Distinction in English
Plan: International Studies Major
Sub-Plan: International Relations and Diplomacy
Plan: English Secondary Major
Sub-Plan: Writing, Rhetoric, and Literacy
Plan: Screenwriting Minor
Plan: Business Minor

Beginning of Undergraduate Record

Autumn 2014 Semester
Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major

Course	Description	Attempted	Earned	Grade	Points
ARTSSCI 1100.01H	ASC College Survey	1.00	1.00	S	0.000
ENGLISH 2201H	Brit Lit: Med-1800	3.00	3.00	A	12.000
ENGLISH 2367.01H	Hnrs US Exper:Lang	3.00	3.00	A-	11.100
INTSTDS 2800	Intro to Peace St	3.00	3.00	A	12.000
SPANISH 2200H	Honors Intermediat	4.00	4.00	A	16.000

Test Credits Applied Toward Arts and Sciences

Course	Description	Attempted	Earned	Grade	Points
BIOLOGY 1113	Energy Transfr&Dvl	0.00	4.00	EM	0.000
ENGLISH 1110.01	First-Yr Engrl Comp	0.00	3.00	EM	0.000
ENGLISH 1167H	1st Yr Writing Sem	0.00	3.00	EM	0.000
HISTORY 1681	World Hist to 1500	0.00	3.00	EM	0.000
HISTORY 1682	Wld Hist 1500-Pres	0.00	3.00	EM	0.000
MATH 1151	Calculus 1	0.00	5.00	EM	0.000
POLITSC 1100	Intro Amer Politics	0.00	3.00	EM	0.000
POLITSC 1200	Intro Comp Politics	0.00	3.00	EM	0.000
PSYCH 1100	Intro Psychology	0.00	3.00	EM	0.000
SPANISH 1101.01	Spanish 1	0.00	4.00	EM	0.000
SPANISH 1102.01	Spanish 2	0.00	4.00	EM	0.000
Test Trans GPA:	0.000	Transfer Totals:	0.00	38.00	0.000

	GPA Hours	Earned	Points
Term GPA	3.930	Term Totals	13.00
Cum GPA	3.930	Cum Totals	52.00
			51.100

Dean's List

Spring 2015 Semester
Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Plan: Business Minor
Plan: Spanish Minor

Course	Description	Attempted	Earned	Grade	Points
EARTHSC 1121H	Hnrs Dynamic Earth	4.00	4.00	A	16.000
ECON 2001.03H	Prin Microeconomic	3.00	3.00	A	12.000
ENGLISH 2279	Wrtg,Rhet,Literacy	3.00	3.00	A	12.000
INTSTDS 4802	Prob & Prosp Peace	3.00	3.00	A	12.000
SPANISH 3404	Pronunciation	3.00	3.00	A	12.000

	GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	16.00
Cum GPA	3.968	Cum Totals	68.00
			115.100

Dean's List

Autumn 2015 Semester
Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Plan: Business Minor
Plan: Spanish Minor

Course	Description	Attempted	Earned	Grade	Points
ANTHROP 2200H	Intro Phys Anthrop	4.00	4.00	A	16.000
CSE 1110	Intr Comptg Techn	2.00	2.00	A	8.000
ENGLISH 4569	Digital Media	3.00	3.00	A	12.000
ENGLISH 4590.08H	US & Colonial Lit	3.00	3.00	A	12.000
ENGLISH 5191	Intrnshp Engrl Stds	3.00	3.00	S	0.000
INTSTDS 3450	HumRts	3.00	3.00	A	12.000

	GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	15.00
Cum GPA	3.979	Cum Totals	44.00
			86.00
			175.100

Dean's List

Spring 2016 Semester
Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Plan: Business Minor

Course	Description	Attempted	Earned	Grade	Points
BUSMGT 3130	Foundation Ops Mgt	3.00	3.00	A	12.000
ENGLISH 4590.06H	The Modern Period	3.00	3.00	A	12.000
ENGLISH 4592	Spec Tpcs Worn Lit	3.00	3.00	A	12.000
POLITSC 1300	Global Politics	3.00	3.00	A	12.000
POLITSC 4331	UN System	3.00	3.00	A	12.000
STAT 2450	Intro Stat Anl 1	3.00	3.00	A-	11.100

	GPA Hours	Earned	Points
Term GPA	3.950	Term Totals	18.00
Cum GPA	3.970	Cum Totals	62.00
			104.00
			246.200

Dean's List

Summer 2016 Term
Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Subplan: Writing, Rhetoric, and Literacy Specialization
Plan: General Business Minor

Course	Description	Attempted	Earned	Grade	Points
LAW 5796	Anglo-Am Legal Sys	6.00	6.00	A	24.000

	GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	6.00
Cum GPA	3.973	Cum Totals	68.00
			110.00
			270.200

Autumn 2016 Semester
Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Subplan: Writing, Rhetoric, and Literacy Specialization
Plan: General Business Minor

Course	Description	Attempted	Earned	Grade	Points
BUSMHR 3100	Fndt of Mgt & HR	3.00	3.00	A	12.000
ENGLISH 3304	Business Writing	3.00	3.00	A	12.000
FILMSTD 4800	St Dev Film TV	3.00	3.00	A	12.000
HISTORY 3505	US Diplo Mid East	3.00	3.00	A-	11.100

Adrienne Bricker
Adrienne Bricker
University Registrar

THE OHIO STATE UNIVERSITY TRANSCRIPT



Name: Laila Ujayli
Student: 200398392
DOB: 08/30/****
Print Date: 03/06/2023
Page 2 of 2
OSUOF

INTSTD	4800	Cultural Diplomacy	3.00	3.00	A	12.000	Undergraduate Career Totals			
							Cum GPA:	3.978	Cum Totals	125.00
									171.00	497.300
									Completed Milestones	
									Ohio Transfer Module	
Term GPA	3.940	Term Totals	15.00	15.00		59.100			***End of Undergraduate Transcript***	
Cum GPA	3.967	Cum Totals	83.00	125.00		329.300				

Dean's List

Spring 2017 Semester

Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Subplan: Writing, Rhetoric, and Literacy Specialization
Plan: General Business Minor

Course	Description	Attempted	Earned	Grade	Points
BUSML 3150	Fndtns of Mktg	3.00	3.00	A	12.000
ENGLISH 4573.02	Rhet & Soc Action	3.00	3.00	A	12.000
ENGLISH 4999H	Honors Research	3.00	3.00	S	0.000
FILMSTD 4890	Adv Screenwriting	3.00	3.00	A	12.000
GEOG 3701	Making Mdrn Wrld	3.00	3.00	A	12.000

			GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	12.00	15.00	48.000
Cum GPA	3.971	Cum Totals	95.00	140.00	377.300

Dean's List

Autumn 2017 Semester

Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Subplan: Writing, Rhetoric, and Literacy Specialization
Plan: Business Minor
Plan: Screenwriting Minor

Course	Description	Attempted	Earned	Grade	Points
ACCTMIS 2000	Foundation of Acct	3.00	3.00	A	12.000
ENGLISH 3271	Struct English Lang	3.00	3.00	A	12.000
ENGLISH 4559	Intro Narr Theory	3.00	3.00	A	12.000
ENGLISH 4591.02H	Sp Topics Rhetoric	3.00	3.00	A	12.000
ENGLISH 4999H	Honors Research	1.00	1.00	S	0.000
THEATRE 5331	Screenwriting	3.00	3.00	A	12.000

			GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	15.00	16.00	60.000
Cum GPA	3.975	Cum Totals	110.00	156.00	437.300

Dean's List

Spring 2018 Semester

Program: Arts and Sciences
Plan: International Studies Major
Subplan: International Relations and Diplomacy Specialization
Plan: English Secondary Major
Subplan: Writing, Rhetoric, and Literacy Specialization
Plan: Business Minor
Plan: Screenwriting Minor

Course	Description	Attempted	Earned	Grade	Points
BUSFIN 3120	Intro to Finance	3.00	3.00	A	12.000
ENGLISH 4597.04H	Intrdiscp App Narr	3.00	3.00	A	12.000
FILMSTD 4640	Cinema History	3.00	3.00	A	12.000
FILMSTD 4881	ScreenwritingTV	3.00	3.00	A	12.000
HISTORY 3375	Mongol Empire	3.00	3.00	A	12.000

			GPA Hours	Earned	Points
Term GPA	4.000	Term Totals	15.00	15.00	60.000
Cum GPA	3.978	Cum Totals	125.00	171.00	497.300

Dean's List



OFFICE OF THE UNIVERSITY REGISTRAR
STUDENT ACADEMIC SERVICES BUILDING, 5TH FLOOR
281 WEST LANE AVENUE
COLUMBUS, OH 43210-1132
TELEPHONE: 614-292-9330
EMAIL: REGISTRAR@OSU.EDU

TRANSCRIPT KEY

RELEASE OF INFORMATION

This transcript cannot be released to another person, agency or organization except to officials internal to your own organization or agency who have a reasonable business use for the information. Release to other parties requires written consent of the student.

ACCREDITATION

The Ohio State University (Columbus, Lima, Mansfield, Marion, Newark and the Agricultural Technical Institute, Wooster, Ohio) is accredited by the Higher Learning Commission as a degree-granting institution at the associate, baccalaureate, masters, professional and doctoral levels.

DETAILED TRANSCRIPT KEY

For a more detailed version of this transcript key including information on good standing, probation, dismissal and the definition of enrollment status, please visit <https://registrar.osu.edu/alumni/transcriptkey.asp>

GRADING SYSTEM

A	• Excellent.....4.0 Pts	I	• Incomplete.....0 Pts
A-	• Excellent.....3.7 Pts	IP	• In Progress.....0 Pts
B+	• Above Average.....3.3 Pts	IX	• Extension of Incomplete.....0 Pts
B	• Above Average.....3.0 Pts	P	• Progress.....0 Pts
B-	• Above Average.....2.7 Pts	PA	• Pass.....0 Pts
C+	• Average.....2.3 Pts	PE	• Emergency Pass.....0 Pts
C	• Average.....2.0 Pts	NP	• Non-pass.....0 Pts
C-	• Average.....1.7 Pts	R	• Registered to Audit.....0 Pts
D+	• Poor.....1.3 Pts	S	• Satisfactory.....0 Pts
D	• Poor.....1.0 Pts	U	• Unsatisfactory.....0 Pts
E	• Failure.....0 Pts	W	• Withdrew.....0 Pts
EM	• Examination Credit.....0 Pts	NG	• Grade unreported by instructor.....0 Pts
EN	• Failure-Non Attendance.....0 Pts	NEN	• EN grade for PA/NP course.....0 Pts
K	• Transferred Credit.....0 Pts	UEN	• EN grade for S/U course.....0 Pts

notation denotes a course involved in the forgiveness or substitution of grades - see Recalculation of Grades

SPECIAL COURSE NUMBER NOTATIONS

E suffix	Honors embedded course
H suffix	Honors course or honors version of a course
S suffix	Service Learning course
T suffix	Technical course (part of a two year technical program)

RECALCULATION OF GRADES

FORGIVENESS OR SUBSTITUTION OF GRADES: Students may petition their enrollment unit to repeat a course, and after completing the course the second time, have the original course credit and grade excluded from the calculation of the student's cumulative point-hour ratio, but remain on the student's official permanent record. The course or courses being substituted or repeated will bear the symbol "#" to the left of the grade.

PERMITTED TO RESTART GPA or FRESH START: An undergraduate student who enrolls in the university after an absence of five or more years may petition to have their GPA recalculated. If the petition is approved, the student resumes their academic program with no cumulative GPA. All courses taken will remain on the permanent record.

This Academic Transcript from The Ohio State University located in Columbus, OH is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc. is acting on behalf of The Ohio State University in facilitating the delivery of academic transcripts from The Ohio State University to other colleges, universities and third parties.

This secure transcript has been delivered electronically by Parchment, Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The Ohio State University's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the University Registrar, The Ohio State University, 281 West Lane Avenue, Columbus, OH 43210-1132, Tel: (614) 292-9330, registrar@osu.edu.

CALENDAR

- The semester system replaced the quarter system for the university in summer 2012
- The semester system replaced the quarter system for the College of Law in autumn 1984

UNIVERSITY CLASS RANKING SYSTEM

Student rank in all undergraduate colleges is based on total credit hours completed and recorded. Graduate students are not ranked. Professional students are ranked according to progress within their curriculum.

Semester Calendar			Quarter Calendar		
Rank	Earned Hours		Rank	Earned Hours	
Freshman	0	through 29	Freshman	0	through 44
Sophomore	30	through 59	Sophomore	45	through 89
Junior	60	through 89	Junior	90	through 134
Senior	90	and up	Senior	135	and up

COURSE NUMBERING SYSTEM

SEMESTER CALENDAR

1000-1099	UG (Undergraduate) - Non Credit Courses Non-credit courses for orientation, remedial, or other non-college-level experiences. These are courses in addition to a program's graduation requirements.
1100-1999	UG - Introductory Level Undergraduate Courses Basic courses providing undergraduate credit, but not to be counted toward major or field of specialization in any department. Courses at this level are beginning courses, required or elective courses that may be a prerequisite to other courses.
2000-2999	UG - Intermediate Level Undergraduate Courses Intermediate courses providing undergraduate credit and may be counted toward a major or field of specialization.
3000-3999	UG - Upper Level Undergraduate Courses Upper Level courses providing undergraduate credit that may be counted toward a major or field of specialization.
4000-4999	UG - Advanced Level Undergraduate Courses Advanced Level courses providing undergraduate credit that may be counted toward a major or field of specialization. Graduate students may enroll in and receive graduate credit for 4000-level courses outside their own graduate program.
5000-5999	UG and G (Graduate) - Dual Career Level Courses Courses that are regularly offered for both graduate credit and undergraduate credit. Advanced Level courses providing undergraduate credit that may be counted toward a major or field of specialization. Foundational coursework and research providing graduate or professional credit.
6000-6999	G - Foundational Level Graduate and Professional Courses Foundational courses and research providing graduate or professional credit.
7000-7999	G - Intermediate Level Graduate and Professional Courses Intermediate courses and research providing graduate or professional credit.
8000-8999	G - Advanced Level Graduate and Professional Courses Advanced courses and research providing graduate or professional credit.

Quarter Calendar

000-099	Non-Credit Courses (except certain seminars and colloquia) for orientation, remedial, or other non-college-level experiences. Credit is not applicable to Graduation Requirements.
100-199	Basic Courses providing undergraduate Credit but not to be counted on a major or field of specialization in any department. Beginning Courses, Required, or Elective Courses that may be prerequisite to other courses.
200-299	Basic Courses providing Undergraduate Credit and may be counted on a major or field of specialization.
300-499	Intermediate Courses providing Undergraduate Credit or Basic Professional Credit that may be counted on a major or field of specialization.
500-599	Intermediate Courses providing Undergraduate or Professional Credit that may be counted on a major or field of specialization and may provide Graduate Credit only in other departments.
600-699	Courses providing Undergraduate or Professional Credit that may be counted on a major or field of specialization, and may provide Graduate Credit (in all departments).
700-799	Advanced Courses providing Undergraduate, Graduate, or Professional Credit.
800-999	Courses providing Graduate Credit and are open to undergraduates only with the approval of the Vice Provost for Research and Dean of the Graduate School.

**ACADEMIC TRANSCRIPT****Personal Information**

Student:	Laila UJAYLI	Date of Birth:	30 August 1996
University Reference:	1291637	HESA Reference:	1911565028644
Qualification Sought:	Master of Public Policy	FHEQ Level:	Masters
Start Date:	28 September 2020		

Programme Information

Teaching Institution:	University of Oxford	Awarding Institution:	University of Oxford
College:	Lady Margaret Hall	Mode of Attendance:	Full-time
Programme of Study:	Master of Public Policy	Language of Instruction:	English

Award Information

Qualification Awarded: Master of Public Policy in Public Policy
 Classification: Distinction
 Date of Award: 15 October 2021

Assessment Information

Academic Year	Assessment Name	Result Mark/Grade	Attempt Number
2020/21	Applied Policy - Behavioural Science and Decision Making in Public Policy	Pass	1
2020/21	Applied Policy - Communications	Pass	1
2020/21	Applied Policy - Negotiation	Pass	1
2020/21	Applied Policy - Public Budgeting	Pass	1
2020/21	Economics for Public Policy	67	1
2020/21	Evidence and Public Policy (Combined)	66	1
2020/21	Foundations	70	1
2020/21	Law and Public Policy	74	1
2020/21	Nationalism, Populism and the Future of Democracy	70	1
2020/21	Policy Challenge I	Pass	1
2020/21	Policy Challenge II (Combined)	70	1
2020/21	Summer Project Report	Merit	1
2020/21	The Politics of Policymaking	64	1
2020/21	Transnational Organised Crime and Global Security	69	1

End of Transcript



Transcript printed on 21 October 2021

Page 1 of 1

Registrar

THE UNIVERSITY OF OXFORD

Academic Administration Division
Examination Schools
High Street, Oxford, OX1 4BG
United Kingdom

Telephone: +44(0)1865 286212
<http://www.ox.ac.uk/students/graduation>
email: degree.conferrals@admin.ox.ac.uk

About the University of Oxford

The University of Oxford is an independent self-governing university. It is the oldest university in the English-speaking world and has been in continuous existence for some nine centuries. It is an international leader in learning, teaching and research. As a collegiate institution, it comprises the central university and 38 colleges and 6 permanent private halls.

University of Oxford Transcripts

The transcript should not be released to another person, organisation or institution except to officials internal to your own organisation or institution who have a reasonable business use for the information. Release to other parties requires the written consent of the student. The following information is provided to aid in the evaluation of this student's academic record. Further explanation or detailed information can be obtained by contacting Degree Conferrals at the above address.

Under University regulations, Boards of Examiners may, where appropriate, take account of information additional to the profile of marks listed overleaf in deciding the final degree classification awarded to any student.

The explanatory text on the transcript is subject to change until such time that the programme of study is completed.

Academic Credit

The University does not routinely apply credit weightings to its programmes and its courses are not generally taught on a modular basis. We take each year of full-time undergraduate study to equal 120 UK credits and 180 UK credits for Masters-level postgraduate study according to the Higher Education Credit Framework for England. In relation to the European Credit Transfer Scheme (ECTS), this is equivalent to 60 credits for undergraduate study and 90 credits for Masters-level postgraduate study.

Framework for Higher Education Qualifications (FHEQ levels)

8 (Doctoral)	Doctoral Degrees (e.g. DPhil, DCLinPsych)
7 (Masters)	Master's Degrees (including Integrated Master's Degrees) Postgraduate Diplomas & Certificates
6 (Honours)	Bachelor's Degrees with Honours Bachelor's Degrees Professional Graduate Certificate in Education
5 (Intermediate)	Undergraduate Diplomas
4 (Cert)	Undergraduate Certificates

Authentication

This academic transcript can only be considered authentic if it is printed on official University of Oxford transcript paper and bears both the Registrar's signature and the official University hologram. Further authentication may be obtained by contacting Degree Conferrals at the address above.

Mark Scales

All marks included on a final academic transcript have been ratified by the Registrar. Examiners are required to express final agreed marks on all formally assessed work according to the following marking scales:

Undergraduate Programmes

	Model 1	Model 2
70-100	First Class	Distinction
60-69	Upper Second Class	Pass
50-59	Lower Second Class	Pass
40-49	Third Class	Pass
30-39	Pass	Fail
0-29	Fail	Fail

Model 1 will be used for all final assessments. Model 2 will be used for all qualifying assessments unless the explanatory text overleaf states otherwise.

Postgraduate Taught Programmes

For students who started their courses **before** October 2018.

Model 1	Model 2	
70-100	70-100	Distinction
50-69	60-69	Pass
0-49	0-59	Fail

For students who started their courses **from** October 2018.

Model 1	Model 2	
70-100	70-100	Distinction
N/A	65-69	Merit
50-69	50-64	Pass
0-49	0-49	Fail

Model 2 will be used for all Award Programmes unless the explanatory text overleaf states otherwise.

Transcript Terminology

Results Not Moderated (On Course Transcripts Only): Indicates a mark that may be subject to moderation in the process of concluding the final outcome of an examination comprising more than one part and taken over more than one year.

Declared to have deserved: the exam board considered the candidate was absent from part of the examination for good cause and declared them to deserve the Award.

Programme Information

The relevant *Examination Regulations* for the programme are available at:
<https://www.admin.ox.ac.uk/examregs>

**ACADEMIC TRANSCRIPT****Personal Information**

Student:	Laila UJAYLI	Date of Birth:	30 August 1996
University Reference:	1291637	HESA Reference:	1911565028644
Qualification Sought:	Master of Studies	FHEQ Level:	Masters
Start Date:	13 October 2019		

Programme Information

Teaching Institution:	University of Oxford	Awarding Institution:	University of Oxford
College:	Lady Margaret Hall	Mode of Attendance:	Full-time
Programme of Study:	Master of Studies in Film Aesthetics	Language of Instruction:	English

Award Information

Qualification Awarded: Master of Studies in Film Aesthetics
 Classification: Distinction
 Date of Award: 27 August 2020

Assessment Information

Academic Year	Assessment Name	Result Mark/Grade	Attempt Number
2019/20	Concept Essay	67	1
2019/20	Dissertation	69	1
2019/20	Essay One	69	1
2019/20	Essay Two	71	1

Students studying in the 2019-20 academic year faced severe disruption due to the exceptional effects of the Covid-19 pandemic, impacting the March-June 2020 assessment period, and this should be taken into account in reading the transcript. Some parts of assessments were cancelled for reasons entirely beyond students' control; in these cases students are deemed to have passed and these assessments are listed without an accompanying mark.

End of Transcript



Transcript printed on 07 September 2020

Page 1 of 1

Registrar

THE UNIVERSITY OF OXFORD

Academic Administration Division
Examination Schools
High Street, Oxford, OX1 4BG
United Kingdom

Telephone: +44(0)1865 286212
<http://www.ox.ac.uk/students/graduation>
email: degree.conferrals@admin.ox.ac.uk

About the University of Oxford

The University of Oxford is an independent self-governing university. It is the oldest university in the English-speaking world and has been in continuous existence for some nine centuries. It is an international leader in learning, teaching and research. As a collegiate institution, it comprises the central university and 38 colleges and 6 permanent private halls.

University of Oxford Transcripts

The transcript should not be released to another person, organisation or institution except to officials internal to your own organisation or institution who have a reasonable business use for the information. Release to other parties requires the written consent of the student. The following information is provided to aid in the evaluation of this student's academic record. Further explanation or detailed information can be obtained by contacting Degree Conferrals at the above address.

Under University regulations, Boards of Examiners may, where appropriate, take account of information additional to the profile of marks listed overleaf in deciding the final degree classification awarded to any student.

The explanatory text on the transcript is subject to change until such time that the programme of study is completed.

Academic Credit

The University does not routinely apply credit weightings to its programmes and its courses are not generally taught on a modular basis. We take each year of full-time undergraduate study to equal 120 UK credits and 180 UK credits for Masters-level postgraduate study according to the Higher Education Credit Framework for England. In relation to the European Credit Transfer Scheme (ECTS), this is equivalent to 60 credits for undergraduate study and 90 credits for Masters-level postgraduate study.

Framework for Higher Education Qualifications (FHEQ levels)

8 (Doctoral)	Doctoral Degrees (e.g. DPhil, DCLinPsych)
7 (Masters)	Master's Degrees (including Integrated Master's Degrees) Postgraduate Diplomas & Certificates
6 (Honours)	Bachelor's Degrees with Honours Bachelor's Degrees Professional Graduate Certificate in Education
5 (Intermediate)	Undergraduate Diplomas
4 (Cert)	Undergraduate Certificates

Authentication

This academic transcript can only be considered authentic if it is printed on official University of Oxford transcript paper and bears both the Registrar's signature and the official University hologram. Further authentication may be obtained by contacting Degree Conferrals at the address above.

Mark Scales

All marks included on a final academic transcript have been ratified by the Registrar. Examiners are required to express final agreed marks on all formally assessed work according to the following marking scales:

Undergraduate Programmes

	Model 1	Model 2
70-100	First Class	Distinction
60-69	Upper Second Class	Pass
50-59	Lower Second Class	Pass
40-49	Third Class	Pass
30-39	Pass	Fail
0-29	Fail	Fail

Model 1 will be used for all final assessments. Model 2 will be used for all qualifying assessments unless the explanatory text overleaf states otherwise.

Postgraduate Taught Programmes

For students who started their courses **before** October 2018.

Model 1	Model 2	
70-100	70-100	Distinction
50-69	60-69	Pass
0-49	0-59	Fail

For students who started their courses **from** October 2018.

Model 1	Model 2	
70-100	70-100	Distinction
N/A	65-69	Merit
50-69	50-64	Pass
0-49	0-49	Fail

Model 2 will be used for all Award Programmes unless the explanatory text overleaf states otherwise.

Transcript Terminology

Results Not Moderated (On Course Transcripts Only): Indicates a mark that may be subject to moderation in the process of concluding the final outcome of an examination comprising more than one part and taken over more than one year.

Declared to have deserved: the exam board considered the candidate was absent from part of the examination for good cause and declared them to deserve the Award.

Programme Information

The relevant *Examination Regulations* for the programme are available at:
<https://www.admin.ox.ac.uk/examregs>

Richard H. Fallon, Jr.
HARVARD LAW SCHOOL
1545 Massachusetts Avenue
Areeda Hall 330
Cambridge, MA 02138

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Laila Ujayli, who has recently applied for a position as one of your law clerks.

I got to know Laila in the Fall semester of the just-concluded academic year when she enrolled in my class on the First Amendment. That class included an unusually strong group of students, even by the standards of Harvard Law School. More impressive and gratifying to me, the group exhibited extraordinary openness and even trust as they discussed hard issues in the classroom. As I think back on the Fall semester, I regard Laila as among the small handful of students who contributed most to the tone and substance of class discussions. When I cold-called on her, she was invariably prepared and thoughtful. In more free-wheeling conversations, Laila did not hesitate to take strong stands – especially in advocating a more European-style approach of denying or at least limiting constitutional protections of “hate speech” – but she always did so with empathetic acknowledgment of competing perspectives. Her contributions to class discussion were also impressively diverse. When we talked about the relative merits of rules- and standards-based formulae in various doctrinal contexts, Laila was an articulate champion of clear rules. In a discussion of tensions between the Establishment and Free Exercise Clauses, Laila called vivid attention to the entanglement issues that would arise if governments were required to assess the effectiveness of religiously-based academic instruction for purposes of disbursing government funds to religious as well as secular private schools. At the end of the semester, Laila registered a grade of Pass on the blind-graded final exam. Reflecting on her work over the entire semester, I can say with strong confidence that her grade for the First Amendment course does not accurately reflect her learning, her insights, or her contributions to her classmates’ education through her contributions to class discussion. In my estimation, she is an Honors-level student, and I recommend her accordingly.

Laila’s personal, academic, and professional background strongly influence my appraisal of her. After graduating from Ohio State University *summa cum laude*, Laila studied at Oxford University as a Rhodes Scholar and – unusually in my experience – chose to pursue two separate degrees. In order to enhance her communication skills, she sought and earned the degree of Master of Studies in Film Aesthetics. In order to enrich her capacities for policy analysis, she then completed a second course of study culminating in her receipt of the degree of Master of Public Policy. Observing Laila in my First Amendment class, I admired both her facility for effective expression and her hard-headed appraisals of likely real-world consequences of alternative doctrinal structures.

I also find it impressive that Laila has won acclaim as a semi-professional screenwriter, garnering awards for a film on the experience of civilians during the war in Syria. It is a testament to her energy that she has continued to work on screenwriting projects (with her twin sister) during her time at Harvard Law School while maintaining a full class schedule and participating in a number of Law School-related extracurricular activities, including service as Executive Managing Editor of the *Harvard Civil Rights-Civil Liberties Law Review*.

I might add, in conclusion, that Laila has a warmly engaged and engaging personality. I would expect working with her to be a pleasure.

Overall, I view Laila as highly capable with strong analytical and communicative skills. She is an accomplished writer. She works hard. For all of the reasons given above, I am pleased to recommend her.

If I could possibly provide any further information, please do not hesitate to contact me.

Sincerely,

Richard Fallon
Story Professor of Law

Richard Fallon - rfallon@law.harvard.edu - 617-495-3215

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

This is a letter of strong recommendation for Ms. Laila Ujayli, who has applied for a clerkship in your chambers. Ms. Ujayli is one of the very few students to whom I have offered a recommendation letter before they have sought one out, and in this letter, I hope to explain why. I will describe how I know Ms. Ujayli, my sense of her as a student and legal researcher and writer, and the reasons I believe she will make an excellent contribution to chambers.

Ms. Ujayli was a student in my Fall 2022 Public International Law course, as well as my 2022-2023 writing group. I will discuss these classes, and her performance, in turn.

Very briefly, Public International Law (PIL) is an intensive, four-credit doctrinal survey course that introduces students to the field of public international law. The first two-thirds of the course cover the classic foundations of the law, whereas the final third explores the application of doctrine to the substantive fields of the use of force, international human rights, and international humanitarian law. Unlike most large doctrinal courses, students do not have a casebook, but work with a dense textbook and unedited decisions of the International Court of Justice and other key tribunals. This year, I administered my most difficult examination to date, and Ms. Ujayli received an H in the course. In addition to this, she was an exceptional addition to the class: her questions and comments throughout the term were thoughtful, displayed a deep engagement with the reading, and often articulated concerns that many other students had. I note that Ms. Ujayli's transcript reflects a remarkable trajectory of improvement: based on my interactions with her, and her performance in my course, I would expect this to only continue and become more impressive over the next year.

It was in my writing group that I feel I really got to know Ms. Ujayli and her formidable skills. The writing group consists of a small number of students who work together over the course of an entire academic year to prepare a scholarly-length research paper, and who are asked to read and comment on their colleagues' projects as much as they develop their own. Ms. Ujayli's project was highly ambitious: to seek to capture the current state of international law regarding the sale and transfer of lethal weapons of war, and to connect this with gaps in corporate accountability at the domestic and international levels. The project was particularly daunting because it sought to provide an extensive descriptive account of arms sales from the United States as well as a normative analysis of how international law regulates these sales.

Ms. Ujayli's research, writing, and communicative skills were so exceptional that she was able to produce a paper that I consider publication-quality, and which I would be happy to share with many academic and practitioner colleagues. Perhaps most noteworthy, she was able to capture and distill an immense amount of factual and doctrinal information in a manner that is reader-friendly and engaging. Weapons law is often considered one of the more 'boring' aspects of the law of war, in part because it is so technical and fragmented across the domestic and international planes. By presenting her research through the lens of the "anatomy of an arms sale," from procurement through to the use of a particular weapon in a catastrophic strike in Yemen, Ms. Ujayli managed to write a gripping paper that conveys clearly to the reader why the law is in urgent need of rethinking. I was so impressed with her ability to bring such a technical set of issues to life, that I remarked to a number of colleagues about her paper and its potential for energizing new scholarship and practice in the discipline.

Just as impressive as her research and writing, Ms. Ujayli was an exceptional student in terms of her engagement with her colleagues' work. She conducted herself more like a fellow professor than a student: reading other students' writing carefully, bringing concrete ideas for how they could improve, using empathy to understand what kinds of arguments they were seeking to make, and then working with them to better develop their claims. I realize this is perhaps an over-utilized phrase in letters of recommendation, but she was truly a pleasure to have in class. She had the kind of editorial mind that made me think I would love to obtain her feedback on my own future drafts! For this reason, I was not surprised to learn that one of her Master's degrees is in film: she brings to law a sense of narrative flow and storyline that I think sets her apart in terms of her sense that we must be able to craft accounts of law and legal institutions that are compelling to a public audience, those whom the law is meant to serve.

For these reasons, I believe Ms. Ujayli will make an excellent contribution to chambers. She is a rigorous reader and analytical thinker, but also a gifted and mature writer and communicator. I expect great things from her as a public servant, and it has been a privilege to get to know her this year.

Please do not hesitate to contact me should you require further information or have additional questions.

Sincerely,

Naz Khatoon Modirzadeh
Professor of Practice
Director, Harvard Law School Program on International Law and Armed Conflict

Naz Modirzadeh - nmodirzadeh@law.harvard.edu - 617-495-1066

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to enthusiastically recommend Ms. Laila Ujayli for a clerkship in your chambers. Laila is a gifted writer, an incisive legal thinker, a pragmatic problem solver, and possesses the work ethic and professionalism to be an exemplary law clerk.

As background, I am a Professor of Practice at Harvard Law School, where Laila was my student. I served years ago as a law clerk to Supreme Court Justice Harry A. Blackmun and to U.S. District Court Judge Robert L. Carter in the Southern District of New York, and have occupied a number of senior government and non-profit positions over the years. In those capacities, I have taught, supervised, and worked with many hundreds of law students and recent graduates. In my estimation, Laila ranks among the top of those emerging professionals.

Laila was a student in my seminar on Framing, Narrative, and Supreme Court Jurisprudence and in my lecture course on Race and the Law. She received Honors grades in both classes. The Framing seminar often proves challenging to law students, as it requires them to read and discuss Supreme Court opinions from doctrinal, rhetorical, and strategic perspectives. Though Laila was a 1L at the time, she proved to be adept at each of these tasks, adding new insights and greatly enhancing classroom discussion. She produced an innovative and sophisticated final paper, exploring the Supreme Court's narrative construction of security in cases alleging executive abuse.

In my Race and the Law course, Laila consistently moved the entire class forward with cogent and insightful comments. Importantly, she was willing and able to tackle all sides of legal issues and handled provocative material with respect for different perspectives—a quality that is often lacking in students addressing sensitive topics. Her final exam was among the best in the class and again reflected her strong writing and analytical skills.

Laila came to law school with two master's degrees from the University of Oxford—one in the arts and one in public policy—and she has built upon that diverse scholarship to become a well-rounded and effective legal thinker and advocate. Outside of the classroom, she has amassed an impressive array of experiences relevant to the role of law clerk, including work with the U.S. Attorney's Office for Massachusetts, private law firms, international think tanks, and professional journals, as well as our own Civil Rights-Civil Liberties Law Review. Remarkably, her skills also include screenwriting, where she has received several awards and accolades.

Finally, Laila has a winning personality, including a nice sense of humor and a strong sense of herself, combined with a degree of modesty despite her considerable achievements. She would be a welcome presence in any judge's chambers.

In short, I believe that Laila exemplifies the qualities that one would want in a law clerk: excellent research and writing skills, sound analysis, good judgement, a strong work ethic, and a commitment to justice and the rule of law. I am pleased to give her my highest recommendation.

Thank you for the opportunity to comment on Laila's application. Please feel free to be in touch with any questions you may have.

Sincerely,

Alan Jenkins
Professor of Practice
Harvard Law School

Alan Jenkins - ajenkins@law.harvard.edu - 646-312-9278



U.S. Department of Justice

Joshua S. Levy
*Acting United States Attorney
District of Massachusetts*

Main Reception: (617) 748-3100

*John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210*

May 30, 2023

The Honorable Jamar K. Walker
District Judge
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Letter of Recommendation for Laila Ujayli, Harvard Law School

Dear Judge Walker:

It is my pleasure to submit this letter of recommendation for Laila Ujayli to serve as a law clerk in your chambers. As background, I am an Assistant United States Attorney focusing on securities fraud and other white collar crimes. Before joining the Department of Justice, I worked for a global law firm, and before that, I served as a law clerk for two judges on the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Massachusetts, respectively.

Laila completed a semester-long clinical internship with the United States Attorney's Office during her second year at Harvard Law School, and I was Laila's principal supervisor during that internship. Since I joined the office, Laila has been the highest-performing intern in our unit. Her legal research, which she often performed under the pressures of trial, was on-point, efficient, and thoughtful. Similarly, Laila's written work, including legal memoranda and drafts of pleadings, was clear, concise, and persuasive.

Laila's work ethic matches her abilities. She would often arrive early and stay late, and she even made herself available on days when she was not scheduled to work due to her class schedule. There is no doubt in my mind that Laila, right now, would serve as an exceptional law clerk, even with a year remaining in law school; frankly, she performed at a higher level than most junior associates with whom I worked in private practice.

I understand that your chambers receives hundreds of letters of recommendation on behalf of qualified and hard-working applicants like Laila. Nevertheless, I believe what sets Laila apart from other applicants is the array of “soft” qualities that may not be apparent from her resume. Laila exhibits intellectual and emotional maturity well beyond her years. She demonstrates a unique ability to balance intellectual curiosity, open-mindedness, and an ability to listen to other viewpoints on one hand, with firm beliefs and the ability to speak persuasively on the other hand. Exuding credibility, Laila is confident when she knows the answer to a question, and equally confident to acknowledge that she does not yet know the answer—but will find it.

Finally, everyone in our unit, from paralegals to our unit chiefs, found Laila a delight to work with, and she is exactly the type of co-worker I would have enjoyed working with every day when I was a law clerk.

* * *

Thank you for your time and attention to this letter. If further information would be helpful, I would be happy to discuss Laila’s application by phone. At your convenience, I can be reached at 617-748-3208 and ian.stearns@usdoj.gov.

Sincerely,

/s/ Ian J. Stearns

Ian J. Stearns

Assistant United States Attorney

LAILA UJAYLI

lujayli@jd24.law.harvard.edu | (614) 707-9157 | 1654 Massachusetts Ave Unit 62, Cambridge, MA 02138

WRITING SAMPLE

Drafted Spring 2022

The attached is an excerpt from a 20-page paper for a seminar titled “Framing, Narrative, and Supreme Court Jurisprudence.” For length, I have removed discussion of a class-specific mode of narrative inquiry and in-depth analysis of a concurring justice’s opinion in the primary case examined for the paper, *United States v. Zubaydah*.

**Obscuring Abuse:
Security, State Secrets, and Storytelling in *United States v. Zubaydah***

Dissenting in *United States v. Zubaydah*, Justice Gorsuch writes that “recent history reveals that executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses and even ordinary negligence from public view.”¹ Joined by Justice Sotomayor, Justice Gorsuch articulates a case against the long-standing practice of utmost judicial deference to the executive branch on issues implicating national security, specifically within the context of the state secrets privilege.

Justice Gorsuch’s choice of the “shroud” metaphor is an apt one. To shroud is to cover or envelope something. Most commonly, we use the term when we describe wrapping a corpse before burial – draping fabric across a body to obscure the deceased from public view. Similarly, when granting judicial deference to the government on issues of national security, the Supreme Court has often narratively constructed security as a barrier between “neutral” evidentiary issues and the injuries for which aggrieved persons seek a remedy. This construction insulates the Court from weighing purportedly legitimate security interests against allegedly abusive executive action, ultimately operating to obscure government abuse from the critical eyes of the Court – and the public.

This paper explores the Court’s narrative construction of security in cases involving discrimination or executive abuse. Part I examines the Court’s past deployment of narrative techniques like episodic framing to construct this security barrier and dissenting justices’ use of metaphor to pierce it. Part II introduces *Zubaydah* and the state secrets privilege. Part III examines the construction of the security barrier in *Zubaydah*’s plurality opinion, and the efforts to challenge it in the dissent. Finally, Part IV concludes with the importance of dismantling this narrative

¹ *United States v. Zubaydah*, 142 S. Ct. 959, 985 (2022).

construction of security in future cases.

I. Framing and Metaphor: Examining the Court's Security Narratives

Narratology, or the study of “what the narrative is, how it works, what its parts might be, and how they might go together,” can offer useful tools for examining how judges arrive at legal outcomes and seek to legitimate those outcomes.² That legitimizing effort is especially important for Supreme Court opinions that are likely to be widely disseminated and consumed, including to those outside the legal profession. In these opinions, American literary theorist Peter Brooks argues that part of the Court’s task is to “activate conviction that its narrative is the true and the right one.”³ Therefore, the “ability to analyze narrative as narrative – to take it apart and put it back together in the manner of the narratologist – could be of clear benefit to those who have to make legal sense of ‘what happened.’”⁴ In an effort to unpack “what happened” in *Zubaydah*, this paper focuses on two general narrative techniques deployed in cases litigating allegations of government abuse that implicate security: first, the use of episodic or thematic framing to attribute responsibility; and second, the use of metaphor to challenge that framing. This section explores how each of these techniques contribute to the narrative construction of security as a barrier.

The framing of a political issue can impact an audience’s attribution of responsibility. In exploring this dynamic in television news, political scientist Shanto Iyengar distinguishes between two types of frames: episodic and thematic.⁵ The episodic news frame illustrates broader political issues through specific examples or events, such as “a terrorist bombing, a homeless person, or a case of illegal drug usage.”⁶ By contrast, the thematic frame “depicts political issues more broadly

² Peter Brooks, *Narrative Transactions – Does the Law Need a Narratology?* 18 YALE J.L. & HUMAN. 1, 4 (2006).

³ *Id.* at 27.

⁴ *Id.* at 25.

⁵ Shanto Iyengar, *Framing Responsibility for Political Issues*, 546 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 59, 59-60 (1996).

⁶ *Id.* at 62.

and abstractly by placing them in some appropriate context – historical, geographical, or otherwise.”

⁷ For example, an episodic frame might profile an unemployed coal miner, while the thematic frame might feature a series of individuals – from coal miners, to economists, to climate scientists – speaking to evolving trends in American energy. While most reporting combines episodic and thematic elements, the predominant frame can impact what the viewer takes away from the story. This happens in two ways. First, the frame can shape a viewer’s decision about whether individuals, or society more generally, bear causal responsibility for the issue portrayed.⁸ Second, the frame can inform a viewer’s opinion as to how society and government should alleviate the problem by, for example, addressing underlying political or economic grievances (societal treatment responsibility) or imposing retaliation or punishment against individuals (punitive treatment responsibility).⁹

After conducting an experimental study, Iyengar found that “episodic framing breeds individualistic as opposed to societal attributions of responsibility.”¹⁰ He notes that framing choices can have a significant impact on stories about crime and security, including terrorism:

When the news depicted terrorism in thematic terms – for instance, by noting recent changes in US diplomatic policy toward countries suspected of fomenting international terrorism – viewers’ causal and treatment attributions gravitated toward societal factors. When the news depicted a particular act of terrorism, however, attributions became specifically more individualistic and punitive in orientation.¹¹

As a result of the study, Iyengar concludes that episodic framing tends to trace national issues to “private actions and motivations rather than deep-seated socioeconomic or political conditions.”¹² Episodic framing thus makes it less likely that the audience will attribute responsibility for major issues to systemic failings, and the government’s shortcomings in addressing them. Consequently,

⁷ *Id.*

⁸ *Id.* at 64-65.

⁹ *Id.*

¹⁰ *Id.* at 62.

¹¹ Iyengar, *supra* note 5, at 66.

¹² *Id.* at 62.

Iyengar finds that by “reducing complex issues to the level of anecdotal cases, episodic framing leads viewers to attributions that shield society and government from responsibility.”¹³

Although Iyengar’s research focuses on television news, his distinction between episodic and thematic frames – and their subsequent connection to the attribution of responsibility – is useful for analyzing the framing choices in Supreme Court opinions. While the case format might naturally lend itself to episodic framing, the degree to which a judicial opinion prioritizes a thematic over an episodic frame, or vice versa, can vary. By looking at a few security cases litigating executive abuse, it is possible to identify a pattern. Opinions that defer to the government often deploy an episodic frame. By contrast, opinions that rule against the government will primarily rely on a thematic frame. Notably, the judiciary’s historically expansive deference to the government on security interests creates a trend of episodic frames in the majority opinions, and thematic frames in the dissents.

Take, for example, one of the most infamous cases of racial discrimination justified by purported national security concerns: *Korematsu v. United States*, which held that the exigencies of war and threats to national security made the exclusion and internment of Japanese Americans constitutional.¹⁴ Justice Black’s majority opinion is predominantly episodic in nature. He largely limits his discussion to the military orders at issue, characterizing *Korematsu* as nothing more than a case about the enforceability of a singular military order in a discrete moment in time.¹⁵ By contrast, the dissenting opinions each adopt distinct thematic frames that situate *Korematsu* within some broader context. Justice Roberts situates the orders within the wider context of war with Japan to show that *Korematsu* was not about the violation of a discrete military order, but about an order that

¹³ *Id.* at 70.

¹⁴ *Korematsu v. United States*, 65 S. Ct. 193, 223 (1944).

¹⁵ *Id.* at 197 (“Our task would be simple... were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers... *we are dealing specifically with nothing but an exclusion order?*”) (emphasis added).

was itself “part of an overall plan for forceable detention.”¹⁶ Meanwhile, Justice Murphy situates *Korematsu* within the broader doctrine of judicial discretion to the military in times of war and a pattern of wider prejudice directed against Japanese-Americans.¹⁷ Lastly, while Justice Jackson’s dissent seems to begin episodically with a focus on Fred Korematsu himself,¹⁸ his dissent ultimately focuses on the precedent that would be set by *Korematsu* within the wider arc of constitutional restraints on executive action – explicitly warning against the dangers of the Court limiting its analysis to the validity of this singular military order without taking into account the “generative power” of such a holding.¹⁹ Therefore, while the majority treats the exclusion order as part of a singular event in American history, the dissents attempt to place it within some broader context to interrogate the appropriateness of the government’s conduct.

This framing pattern is also identifiable in a more recent case: *Trump v. Hawaii*, which held that Proclamation No. 9645’s placement of entry restrictions on nationals of select countries was a facially neutral policy that was within the executive authority of the President, despite the anti-Muslim statements that allegedly motivated the policy first described by then-presidential candidate Donald Trump as a “Muslim ban.”²⁰ The majority opinion, authored by Chief Justice Roberts, is predominantly episodic. While the Chief Justice historically situates the ban and addresses the petitioners’ claims of discrimination, his focus remains narrowly on the Proclamation itself – its development, its justifications, its authorizing legislation, and the critiques leveled against it. His story thus centers on a specific Proclamation and its various contours. By contrast, Justice Sotomayor’s dissent is thematic, telling a broader story about the promise of religious liberty in the

¹⁶ *Id.* at 201 (Roberts, J., dissenting).

¹⁷ *See id.* at 202 (Murphy, J., dissenting).

¹⁸ *See id.* at 206 (Jackson, J., dissenting) (“Korematsu was born on our soil, of parents born in Japan”).

¹⁹ *See id.* at 207 (“A military order, however, unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure...”).

²⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

United States and chronicling the former president's history of anti-Muslim statements.²¹ To Justice Sotomayor, *Trump v. Hawaii* is not a story about the failings of a specific Proclamation, but about a president's attack on a minority faith; the Proclamation is merely a single event in a wider arc.

In cases where the Court defers to the government, an episodic frame insulates the Court from fully reckoning with allegations of abuse. Each case is atomized. Complex questions about the constitutionality of government action are reduced to the "level of anecdotal cases" characterized by uniquely exigent circumstances.²² Judicial deference is justified on the need to permit the executive branch to flexibly respond to them. The Court can therefore rule narrowly on the evidentiary and procedural issues surrounding the government's action, as opposed to the legality of the underlying action. By positioning broader questions about the abusive or discriminatory exercise of executive power beyond the Court's view, this episodic framing ultimately works to shield government from responsibility.²³

To draw attention to this dynamic, dissenting justices employ another narrative technique: metaphorical argumentation. Legal rhetoric scholar Linda Berger writes that an argument is metaphorical for relying "on seeing one thing *as* another" and "mapping or transferring the characteristics, reasoning, processing, and outcomes of one domain (the source) onto another (the target)."²⁴ As a result, metaphor invites the audience to see certain aspects of a concept, increasing – or limiting – its meaning.²⁵

Metaphors centered on blindness and concealment are sometimes used by dissenting justices in cases involving judicial deference on issues of national security. In Justice Roberts' dissent in

²¹ See *id.* at 2433 (Sotomayor, J., dissenting).

²² Iyengar, *supra* note 5, at 70.

²³ See *id.*

²⁴ Linda L. Berger, *The Lady or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 278 (2010).

²⁵ See *id.*

Korematsu, he twice refers to the justices “shutting [their] eyes.”²⁶ Years later, Justice Sotomayor similarly invokes the concept of shutting eyes or concealing in *Trump v. Hawaii* by using “blindly”: “By *blindly* accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu*.”²⁷ Sotomayor also quotes from another case, which noted that security remains a matter of judicial concern: “[National security] is not ‘a talisman’ that the Government can use to ‘ward off inconvenient claims – a ‘label’ used to ‘cover a multitude of sins.’”²⁸ Metaphors of blindness and concealment clarify the dynamic created by the Court’s episodic framing – the government enfoldes discriminatory claims within the exigencies of national security, and justices “blindly” refuse to lift the fabric. The justices drawing attention to this construction speak more directly to the opinions to highlight the broader, thematic issues implicated. These narrative patterns offer a useful framework for approaching similar cases, including *Zubaydah*.

II. *Zubaydah* and the State Secrets Privilege

Zubaydah concerns the scope of the government’s common-law state secrets privilege. The Court first formally recognized the privilege in *United States v. Reynolds* (1953), where family members of civilians killed in a military plane crash were barred from accessing the flight accident report due to the government’s claim that it contained sensitive information about military equipment.²⁹ Their claims, however, were allowed to proceed – just without the information that posed a purported risk to national security. Since *Reynolds*, the privilege has expanded, increasingly used to dismiss entire

²⁶ See *Korematsu*, 65 S. Ct. at 201 (Roberts, J., dissenting).

²⁷ See *Trump* at 138 S. Ct. at 2448 (Sotomayor, J. dissenting) (emphasis added).

²⁸ See *id.* at 2446 (citing *Ziglar v. Abbasi*, 582 U.S. 120, 143 (2017)) (emphasis added).

²⁹ *United States v. Reynolds*, 73 S. Ct. 528, 533-34 (1953).

cases as early as the pleading stage.³⁰ Its use has also accelerated. While the government invoked the privilege only 16 times between 1961 and 1980, it did so at least 49 times between 2001 and 2021.³¹ Meanwhile, the Supreme Court has rarely granted certiorari to address the privilege's scope. Thus, as the (unsuccessful) petitioners argued in *Khaled El-Masri v. United States*, "a broad range of executive misconduct has been shielded from judicial review after the *perpetrators themselves* have invoked the privilege to avoid adjudication."³² Last term, however, the Court took up *Zubaydah* to offer more insight into the scope of the state secrets privilege.

Zubaydah asks whether the government can exercise its state secrets privilege to block Guantanamo detainee Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah) from obtaining discovery about his treatment at a CIA black site in Poland to support a Polish investigation into potential crimes committed there. Abu Zubaydah's legal team sought to depose the two architects of the CIA's torture program, James Mitchell and Bruce Jessen. The government intervened and asserted state secrets privilege to block the discovery request, arguing that it would force Mitchell and Jessen to confirm that the site existed in Poland, a confirmation that in and of itself would harm U.S. national security.

Central to the dispute is whether the government can assert state secrets over information that is effectively public knowledge. What has been declassified of the Senate's Report on the CIA's detention and interrogation practices already details much of Abu Zubaydah's treatment in Thailand, as his respondent brief puts forth:

For twenty consecutive days, [CIA contractors Mitchell and Jessen] tortured Abu Zubaydah. Eighty-three times, they strapped him to a board with his head lower than his feet while they poured water up his nose and down his throat. Just when they thought he would drown, they raised the board, allowing him a moment to vomit and gasp before they repeated the

³⁰ Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 117 (2007).

³¹ See *Zubaydah*, 142 S. Ct. at 993 (Gorsuch, J., dissenting).

³² Petition for Writ of Certiorari at 14, *Khaled El-Masri v. United States of America*, 479 F.3d 296 (4th Cir. 2007) (No. 06-0000).

torture. During one session, Abu Zubaydah became ‘unresponsive, with bubbles rising through his open, full mouth.’

Abu Zubaydah was also handcuffed and repeatedly slapped and slammed into walls, forced into a tall, narrow box the size of a coffin, and crammed into another box that would nearly fit under a chair, where he was left for hours. At least once, he was subjected to ‘rectal rehydration.’ The objective of this torture was to ‘induce complete helplessness’ and ‘reach the stage where we have broken any will or ability of the subject to resist’...

In this they succeeded. By the sixth day of his torture, Abu Zubaydah was sobbing, whimpering, twitching, and hyperventilating. He was so broken that he complied with orders at the snap of a finger.³³

Mitchell and Jessen themselves have published a book on the CIA’s program and have been interviewed about Abu Zubaydah’s treatment in Thailand.³⁴ They, however, have not testified about Abu Zubaydah’s treatment in Poland, which prompted the discovery request. Yet the existence of the Poland black site is widely accepted: the Council of Europe issued a report finding that the CIA held Abu Zubaydah in a black site in Poland; the European Court of Human Rights found “beyond a reasonable doubt” that Abu Zubaydah was detained at a black site in Poland; and the President of Poland at the time even confirmed that the black site was established there with his knowledge.³⁵ For these reasons, the Ninth Circuit held that discovery could proceed on the existence of a CIA detention facility in Poland and Abu Zubaydah’s treatment there because the state secrets privilege did not apply to publicly known information.³⁶

A fractured majority of the Supreme Court disagreed, accepting the government’s argument that the mere confirmation of the black site’s existence in Poland could constitute a threat to national security. In a 6-3 decision, the Court reversed the Ninth Circuit’s holding and remanded the case with instructions to dismiss Abu Zubaydah’s application for discovery. The plurality opinion, delivered by Justice Breyer, held that the Government provided “sufficient support for its claim of

³³ Brief on the Merits for Respondents at 5-6, *United States v. Zubaydah*, 142 S. Ct. 959 (2022) (No. 20-827).

³⁴ See *Zubaydah*, 142 S. Ct. at 999 (Gorsuch, J., dissenting).

³⁵ See *id.* at 12.

³⁶ See *id.* at 961.

harm to warrant application of privilege.”³⁷ Concurring in part and in judgement, Justice Thomas, joined by Justice Alito, argued that the Court had no reason to review the Government’s justifications at all because Abu Zubaydah only made a “dubious showing of necessity.”³⁸ Concurring in part, Justice Kavanaugh, joined by Justice Barrett, sought to clarify how a claim of privilege should be reviewed based on *Reynolds*. Concurring in part and dissenting in part, Justice Kagan accepted the government’s claim of privilege but would have remanded the case to allow discovery to go forward while “protecting classified information about location while giving [Abu] Zubaydah access to unclassified information about detention conditions and interrogation methods.”³⁹ Justice Gorsuch, joined by Justice Sotomayor, dissented and rejected the government’s claim, arguing that the information was effectively public and other methods were available to shield sensitive information.⁴⁰ This following section focuses on Justice Breyer’s plurality opinion, and Justice Gorsuch’s dissent.

III. Narrative Analysis of *Zubaydah*

“Obviously the Court condones neither terrorism nor torture, but in this case we are required to decide only a narrow evidentiary dispute,” writes Justice Breyer for the *Zubaydah* plurality.⁴¹ The line encapsulates Justice Breyer’s approach. As he defers to the government’s arguments, he relies on an episodic frame to tell a story about *Zubaydah* that is confined to evidentiary issues. He limits his analysis to examining the government’s arguments, the state secrets doctrine, and Abu Zubaydah’s need for the information. The opinion is so confined to this singular case that broader issues about the exercise of executive power slip to the sidelines. Responding to the dissent’s raising of those issues, Justice Breyer writes, “Justice Gorsuch ignores the nature of this

³⁷ See *id.* at 964 (Breyer, J.)

³⁸ See *id.* at 973 (Thomas, J., concurring).

³⁹ See *id.* at 983 (Kagan, J., concurring in part and dissenting in part).

⁴⁰ *Zubaydah*, 142 S. Ct. at 985 (Gorsuch, J., dissenting).

⁴¹ See *id.* at 967 (Breyer, J.).

litigation. This case arises from *Zubaydah*'s *ex parte* application for discovery under §1782. It is a purely evidentiary proceeding and thus unlike most litigation, which may, after a successful assertion of the state secrets privilege, 'continue without the government's privileged proof.'⁴² Here, Justice Breyer expressly rejects a broader frame. To him, *Zubaydah* represents a singular application of doctrine – not an additional chapter in a line of cases that expand judicial deference to national security, and not a case that might have generative power of its own to further extend that line.

By contrast, Justice Gorsuch offers a sweeping thematic dissent. Skirting a narrow analysis of the contours of Abu Zubaydah's case and the appropriate application of *Reynolds*, Justice Gorsuch casts *Zubaydah* as a missed opportunity to accept responsibility for American mistakes and prevent the unchecked abuse of executive power. He not only details Abu Zubaydah's "ordeal"⁴³ at the hands of the CIA but pulls as far back as the differences between American presidents and British kings to interrogate the purposes and problems of the state secrets doctrine. He even contextualizes *Reynolds*, noting that decades after that case, the flight report was found to contain no state secrets, only proof of government negligence.⁴⁴ Justice Gorsuch also situates *Zubaydah* within a larger arc of cases: "Walking that path [of utmost deference] would only invite more claims of security in more doubtful circumstances – and facilitate the loss of liberty and due process history shows very often follows."⁴⁵ Justice Gorsuch, therefore, frames his dissent as a wider story about accountability for executive abuse. He returns three times to the notion of the executive threatening to withhold the "right of every man's evidence."⁴⁶ He also begins his dissent with the proclamation: "There comes a point where we should not be ignorant as judges of what we know to be true as citizens," as if

⁴² See *id.* at 972.

⁴³ See *id.* at 986 (Gorsuch, J., dissenting).

⁴⁴ See *id.* at 993.

⁴⁵ See *id.* at 994.

⁴⁶ *Zubaydah*, 142 S. Ct. at 991 and 995 (Gorsuch, J., dissenting).

seeking to pull the plurality away from their narrow focus on procedure to occupy a wider lens.⁴⁷

When the plurality rejects the invitation, Justice Gorsuch subsequently casts the Court as an accomplice to the executive that “[abdicates] judicial responsibility...in favor of the Executive’s wish to brush this case out the door”⁴⁸ and “replace[s] judicial inquiry with a rubber stamp.”⁴⁹

Justice Gorsuch bolsters this framing with metaphor. Instead of blindness, he focuses on concealment. He describes the government’s use of national security to “*shroud* major abuses”⁵⁰ and executive officials’ temptation “*to cover up* their own mistakes and even their wrongdoing *under the guise* of protecting national security.”⁵¹ Here, Justice Gorsuch highlights the construction of security as a barrier between the Court and allegations of executive abuse. He also attributes a new quality to the construction: Shame. “The facts are hard to face,” he writes, again evoking an image of the Court tempted to turn away.⁵² He continues, “We know that our government treated Zubaydah brutally... Further evidence along the same lines may lie in the government’s vaults.”⁵³ While different from a shroud or guise, the characterization of these allegations of abuse lying in a vault, locked away and hidden, also recalls concealment. Justice Gorsuch finally concludes: “We should not let shame *obscure* our vision.”⁵⁴

Applying a narrative framework highlights the differences in each justice’s approach to *Zubaydah*. Justice Breyer leans on an episodic frame, while Justice Gorsuch’s dissent is thematically framed. Ultimately, Justice Breyer’s opinion works to insulate the Court from reckoning with the root of Abu Zubaydah’s request – the desire for information about his abuse at the hands of the

⁴⁷ See *id.* at 985.

⁴⁸ See *id.* at 999.

⁴⁹ See *id.* at 1000.

⁵⁰ See *id.* at 992 (emphasis added).

⁵¹ See *id.* at 994 (emphasis added).

⁵² *Zubaydah*, 142 S. Ct. at 1001.

⁵³ *Id.*

⁵⁴ *Id.*

U.S. government to complete his story.⁵⁵ Using metaphor, Justice Gorsuch highlights this narrative construction by mapping inferences from concrete visual images like shrouds, guises, covers, and vaults onto abstract concepts like judicial deference to illustrate security as a type of barrier utilized to conceal abuse and obscure the Court's vision.

IV. Conclusion

There is something unsettling about the Court deploying narrative techniques that shrink the scope of a story in a case where a petitioner sought the information to adequately tell his own. Much remains to be said about how the state secrets doctrine may undermine democracy⁵⁶ and “the aspiration that a remedy be available for a violation of law.”⁵⁷ While Justice Gorsuch's dissent in *Zubaydah* offers an opportunity to reckon with the wider political issues at stake in the state secrets doctrine, only Justice Sotomayor elected to join. Therefore, such abuse may remain shrouded unless the Court changes course.⁵⁸

How narratives about the state secrets doctrine and security are constructed by justices can shape how the public approaches these issues. Iyengar argues that the ultimate effect of narrow, episodic frames is to “protect elected officials from policy failures or controversies.”⁵⁹ “Americans are not, however, intrinsically averse to structural accounts of responsibility for political issues,” Iyengar argues. “When the news presents a general frame of reference for national problems, viewers' reasoning about causal and treatment responsibility shifts accordingly.”⁶⁰ When deploying a thematic frame, the Court can resist shielding the government from responsibility – even if doctrine and precedent demand that deference be applied. Situating cases that litigate executive abuse within

⁵⁵ See *id.* at 987.

⁵⁶ See Claire Finkelstein, *How the State Secrets Doctrine Undermines Democracy*, BLOOMBERG LAW (Mar. 28, 2022), <https://news.bloomberglaw.com/us-law-week/how-the-state-secrets-doctrine-undermines-democracy>.

⁵⁷ DAVID RUDENSTINE, *THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER* 284 (2016).

⁵⁸ See Finkelstein, *supra* note 56.

⁵⁹ Iyengar, *supra* note 5, at 62.

⁶⁰ *Id.* at 70.

broader political questions about the appropriate balance of power can reintroduce democratic accountability to a sphere where it is lacking. It is one thing to accept a government's claim of privilege. It is another to detach that deference from reckoning with the raw exercise of executive power. Rather than insulate itself from reckoning with those failures, the Court should lift the shroud and face them.

Applicant Details

First Name **Joseph**
Last Name **Ulloa**
Citizenship Status **U. S. Citizen**
Email Address ulloajoseph@gmail.com
Address

Address

Street
1900 Elm St, Apt 208
City
Dallas
State/Territory
Texas
Zip
75201
Country
United States

Contact Phone Number **5124137570**

Applicant Education

BA/BS From **University of Texas-San Antonio**
Date of BA/BS **May 2019**
JD/LLB From **UNT Dallas College of Law**
<https://lawschool.untdallas.edu/>
Date of JD/LLB **May 30, 2024**
Class Rank **School does not rank**
Does the law school have a Law Review/Journal? **Yes**
Law Review/Journal **No**
Moot Court Experience **No**

Bar Admission

Admission(s) **Texas**

Prior Judicial Experience

Judicial Internships/Externships **Yes**

Post-graduate Judicial Law Clerk No

Specialized Work Experience

Professional Organization

Organizations	Hispanic National Bar Association (HNBA) Dallas Hispanic Bar Association (DHBA) Just the Beginning Organization
---------------	--

Recommenders

Harokopus, Mary
mary.harokopus@gmail.com
(469) 525-2087
Ranen, Robert
Robert.Ranen@untdallas.edu
Conway, Shannon
shannon.conway@untdallas.edu
This applicant has certified that all data entered in this profile and any application documents are true and correct.

Joseph Ulloa
Dallas, TX 75201
(512) 413-7570 • Josephulloa@my.untDallas.edu

June 6, 2023

U.S. District Judge Jamar K. Walker
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I was excited to learn about the Law Clerk position in Norfolk with the U.S. Eastern District Court. The opportunity to work for a Federal District Judge is exactly what I am looking for. The internship experience I gained with Judge Cardone, combined with my robust legal writing record have given me the skills necessary to make a strong contribution to this Court.

While working with Judge Hoffman, I learned the importance of time sensitive projects, as well as maximizing work product completion. Some of the skills I would bring to the Law Clerk position are:

- Strong legal writing skills
- Outstanding communication skills
- A passion and flair for case projects

I welcome the opportunity to meet with you in person to discuss my skills and experience. Please feel free to contact me at Josephulloa@my.untDallas.edu or by phone at (512) 413-7570.

Thank you in advance for your consideration.

Sincerely,

Joseph Ulloa

Joseph Ulloa

Dallas, TX

(512) 413-7570

Josephulloa@my.untDallas.edu

SUMMARY OF QUALIFICATIONS

- Strong verbal and written communication skills
- Distinguished research and analytical skills, Lexis+ Proficiency Certified and Practice-Ready Certified
- Hands on work experience with federal and state judges

EDUCATION

The University of North Texas at Dallas College of Law (UNT Dallas COL)

Candidate for Juris Doctor

May 2024

Hispanic National Bar Association (HNBA)

October 2021

- (HNBA) Scholar – “Vision in Action” Recipient

The University of Texas at San Antonio (UTSA)

Bachelor of Business Administration in Management

May 2019

Concentration in Legal Studies

Cumulative GPA: 3.25

Major GPA: 3.45

UTSA Summer Law School Preparation Academy- 6 Hours Earned

Summer 2017

- Engaged in panel discussions with local attorneys, judges, law school professors, and politicians
- Key subjects where I excelled included “Writing for Pre-Law” and “Constitutional Law”

EXPERIENCE**Incoming Judicial Intern to Judge Larson – U.S. Northern District, Dallas, TX**

May 2023 – July 2023

- 2023 American College of Bankruptcy Scholar
- Participated in mandatory Bankruptcy Education Programs instructed by federal judges via Zoom
- Observed daily hearings and trials
- Observed complex trials and listened to an Article I Judge analysis in chambers
- Probed Judge’s opinion on plaintiff and defense counsel arguments
- Conducted research and review of trial documents and prepared a memo for Judicial clerks

Judicial Intern to Judge Cardone – U.S. Western District Court, El Paso, TX

June 2022 – July 2022

- Observed daily hearings and jury trials
- Conferred with Judge and Clerks on a Ninth Circuit appellate case by designation
- Conducted research and review of trial documents and prepared a bench memo regarding the intracorporate conspiracy doctrine, including a recommendation to the Judge on how to rule
- Fact and law checked a Report and Recommendation by a Magistrate Judge
- Observed a criminal trial and listened to a District Judge analysis in chambers

Judicial Intern to Judge Hoffman - 68th District Court, Dallas, TX

May 2022 – June 2022

- Conducted research and review of trial documents and prepared a bench memo regarding Texas civil procedure, including a recommendation to the judge on how to rule
- Observed daily hearings and jury trials including cases on personal injury
- Reviewed motions for substitute service and default judgments
- Attended regular networking events with Dallas area attorneys, the Dallas Bar Association, and the Women’s Advocacy Awards

- Participated in Dallas Association of Young Lawyers trial skills boot camp as a mock trial witness

Lexis Associate – UNT Dallas COL Representative, Dallas, TX August 2022 – Present

- Assisted law students with legal research in caselaw, statutes, and secondary sources
- Participated in Lexis legal research certification courses
- Stay current with new Lexis research tools and features
- Managed and tabled Lexis events encouraging legal research

Law Clerk Manager - Brown & Ortiz, P.C., San Antonio, TX January 2017 – May 2017

- Prepared and assisted with weekly zoning applications for attorneys
- Researched properties and codes through the city geographic information services database
- Filed, copied, and aided with other projects as attorneys requested

ACTIVITIES AND HONORS

- **UTSA Summer Law School Preparation Academy** Summer 2023
 - UTSA Pre-Law volunteer tutor
 - Tutor Contracts, Constitutional analysis, and Legal Research and Writing
 - Participated in Law School Students' Panel
- **The Memorial Foundation – Martin Luther King Jr.** 2021-2022
 - Social Justice Fellow
 - Engaged in keynote sessions to enhance foundational knowledge, build skills, and encourage dialogue on current issues within social justice movements
 - Developed and shared a proposal for building a movement on an issue impacting a regional community
 - Engaged with members of the U.S. House and U.S. Senate on issues of social justice and public policy
- **UTSA Alumni Austin Chapter** 2020-2021
 - Vice President
 - Coordinated programs and meetings to work hand in hand with Alumni Association
 - Managed Council e-mail and responded to all inquiries pertaining to the council
 - Assisted administrators at group functions to promote and familiarize with operations
- **Teach for America (TFA)** 2019
 - TFA Corps Member (Selected out of 1000s of candidates to teach in an urban or rural school district across the nation)
 - Engaged in Diversity, Equity, Inclusion development workshops and taught a remedial summer program in Houston ISD
- **UTSA Student Leadership Center-** Participation required in the following events
 - Civil Rights & Social Justice Experience in Southern United States Spring 2018
 - Latinx Leadership Summit Spring 2018
 - Justice Patricia O. Alvarez Storytelling Brunch Fall 2017

ADDITIONAL INFORMATION

- Conversational in Spanish (writing, reading, speaking)
- Interests: Marathon and 10K runner, historical non-fiction reader



UNT Dallas COL Unofficial Transcript - review only

Name: Ulloa, Joseph
Student ID: 11035022

Print Date: 06/05/2023
Student Address: 1900 Elm St Apt 208
Dallas, TX 75201-4568

Program: Juris Doctor
07/20/2021: Active in Program
07/20/2021: JURIS DOCTOR Major

Program: Juris Doctor
08/30/2022: Active in Program
08/30/2022: JURIS DOCTOR Law Juris Doctor Major

Academic Program History

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	2.833	Term Totals	15.000	15.000	15.000	42.500

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Cum GPA	2.872	Cum Totals	31.000	31.000	29.000	83.300

Academic Standing Effective 06/06/2022: Good Standing

Beginning of Law Record

Fall 2021						
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	7099	BEDFORD MENTOR PROGRAM	0.000	0.000	P	0.000
LAW	7100	INTRODUCTION TO LEGAL STUDIES	1.000	1.000	P	0.000
LAW	7104	LEGAL METHODS	1.000	1.000	CR	0.000
LAW	7301	LEGAL WRITING I	3.000	3.000	B	9.000
LAW	7302	CIVIL PROCEDURE I	3.000	3.000	B	9.000
LAW	7401	TORTS	4.000	4.000	B-	10.800
LAW	7407	CONTRACTS	4.000	4.000	B	12.000
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	2.914	Term Totals	16.000	16.000	14.000	40.800
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Cum GPA	2.914	Cum Totals	16.000	16.000	14.000	40.800

Academic Standing Effective 01/06/2022: Good Standing

Spr 2022						
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	7099	BEDFORD MENTOR PROGRAM	0.000	0.000	P	0.000
LAW	7114	LEGAL RESEARCH I	1.000	1.000	A	4.000
LAW	7117	LEGAL RESEARCH II	1.000	1.000	A-	3.700
LAW	7203	CIVIL PROCEDURE II	2.000	2.000	B-	5.400
LAW	7213	PROPERTY I	2.000	2.000	B-	5.400
LAW	7303	LEGAL WRITING II	3.000	3.000	B-	8.100
LAW	7310	CRIMINAL LAW	3.000	3.000	C+	6.900
LAW	7312	PRACTICE FOUNDATION I	3.000	3.000	B	9.000

Fall 2022						
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	7214	PROPERTY II	2.000	2.000	B-	5.400
LAW	7233	DEPOSITION LAW, STRAT AND TECH	2.000	2.000	C+	4.600
LAW	7313	NEGOTIATION AND CONFLICT RESOL	3.000	3.000	B-	8.100
LAW	7352	LEGAL WRITG III: APPELLATE DRAFT	3.000	3.000	B	9.000
LAW	7414	CONSTITUTIONAL LAW	4.000	4.000	C+	9.200

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	2.592	Term Totals	14.000	14.000	14.000	36.300

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Cum GPA	2.781	Cum Totals	45.000	45.000	43.000	119.600

Academic Standing Effective 01/03/2023: Good Standing

Spr 2023						
<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	7127	LAW PRACTICE TECHNOLOGY	1.000	1.000	P	0.000
LAW	7315	UBE FAMILY LAW	3.000	3.000	C	6.000
LAW	7317	PROFESSIONAL RESPONSIBILITY	3.000	3.000	C+	6.900
LAW	7321	BUSINESS ASSOCIATIONS	3.000	3.000	A-	11.100
LAW	7323	FEDERAL CRIMINAL PROCEDURE	3.000	3.000	B-	8.100
LAW	7388	EXTERNSHIP SEMINAR	3.000	3.000	P	0.000

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	2.675	Term Totals	16.000	16.000	12.000	32.100

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Cum GPA	2.758	Cum Totals	61.000	61.000	55.000	151.700

Academic Standing Effective 06/02/2023: Good Standing



UNT Dallas COL Unofficial Transcript - review only

Name: Ulloa, Joseph
Student ID: 11035022

		Sum 2023				
Course		Description	Attempted	Earned	Grade	Points
LAW	7286	CONFLICTS OF LAW	2.000	0.000		0.000
			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	2.000	0.000	0.000	0.000
			Attempted	Earned	GPA Units	Points
Cum GPA	2.758	Cum Totals	63.000	61.000	55.000	151.700
		Fall 2023				
Course		Description	Attempted	Earned	Grade	Points
LAW	7V30	LAW TOPICS	2.000	0.000		0.000
Course Topic:		Employment Law				
LAW	7120	THE TRIAL PROCESS	1.000	0.000		0.000
LAW	7318	EVIDENCE	3.000	0.000		0.000
LAW	7322	COMMERCIAL LAW	3.000	0.000		0.000
LAW	7325	UBE WILLS, TRUSTS AND ESTATES	3.000	0.000		0.000
LAW	7386	BAR EXAM SKILLS/STRATEGIES I	3.000	0.000		0.000
			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	15.000	0.000	0.000	0.000
			Attempted	Earned	GPA Units	Points
Cum GPA	2.758	Cum Totals	78.000	61.000	55.000	151.700
Law Career Totals						
Cum GPA:	2.758	Cum Totals	78.000	61.000	55.000	151.700

End of UNT Dallas COL Unofficial Transcript - review only

February 8, 2023

To Whom It May Concern,

I highly recommend Joseph Ulloa as an addition to your program. I have had the privilege of working with Joseph when he enrolled in my Legal Writing III – Appellate Drafting class at the University of North Texas-Dallas College of Law.

As his Professor, I reviewed Joseph's writing on four different assignments in our class. He was required to draft a Notice of Appeal, Motion to Extend Time, and two mock Briefs of the Merits for the Supreme Court of Texas. The briefs themselves exceeded twenty pages. In all of these assignments, Joseph was a very diligent student who produced high quality work.

Joseph's most notable quality is his persistence. He is a tenacious researcher who regularly analyzed and re-analyzed every issue. I believe that these qualities will serve him well in a judicial clerkship.

Overall, I believe that Joseph will make a fine addition to your program and a fine lawyer one day/

You are welcome to contact me should you need any additional information.

Respectfully,

Robert D. Ranen
(214) 726-6529

I drafted the attached document for Judge Kathleen Cardone during my internship in her chambers. The Judge has given me permission to use this as a sample of my writing. Information revealing the identity of the parties has been changed, and the document has been edited by her law clerk.

To: Law Clerk

From: Joseph Ulloa

Re: — Intracorporate Conspiracy Doctrine

Date: July 26, 2022

QUESTION: Assuming that Officers Houston and Austin conspired to bring false charges against Plaintiff, does the intracorporate conspiracy doctrine mean that Officer Austin cannot be liable for conspiracy in this case?

SHORT ANSWER: No. The doctrine does not apply to this case because Officers Austin and Houston conspired to conceal Officer Houston's misconduct, and that conspiracy falls under the exception to the doctrine.

STANDARDS:

The intracorporate conspiracy doctrine states that members of an organization cannot be liable for conspiring with each other because they are part of the same entity, and a single entity "cannot conspire with itself." *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994). The doctrine originally applied to corporations; but it now also applies to a legal entity such as a police department. *Thompson v. City of Galveston*, 979 F. Supp. 504, 511 (S.D. Tex. 1997). However, there is an exception to this doctrine that applies to members of an entity acting on

behalf of “private interests.” *LaFleur v. McClelland*, No. 4:13-CV-425, 2013 WL 5148181, at *3 (S.D. Tex. Sept. 11, 2013). The exception is supported by the Fifth Circuit, where liability is not barred by the doctrine, when an institution’s employee acts for their own interests. *Benningfield v. City of Houston*, 157 F.3d 369, 379 (5th Cir. 1998). Multiple courts in the Western District of Texas have recognized the exception in cases involving officers employed by a police department. *Villegas v. City of El Paso*, No. EP-15-CV-00386-FM, 2020 WL 981878, at *19 (W.D. Tex. Feb. 28, 2020); *Bright v. City of Killeen*, 532 F. Supp. 3d 389, 398 (W.D. Tex. 2021). Under this exception, when an agent of an organization, acts in a way that is on their own behalf and conspires with another to pursue those “personal interests,” then liability is no longer barred by the intracorporate conspiracy doctrine. *Villegas*, 2020 WL 981878, at *18. As a result, where the agent exploits their authority or engages in “unauthorized acts”, their co-conspirators incur liability. *Collins v. Bauer*, No. 3:11-CV-00887-B, 2012 WL 443010, at *8 (N.D. Tex. Jan. 23, 2012), *R. & R. adopted by* 2012 WL 444014 (N.D. Tex. Feb. 10, 2012). For instance, falsifying a police report and tampering with evidence to conceal misconduct are unauthorized acts. *Cornett v. Ward*, 2020 WL 906290, at *4 (N.D. Tex. Feb. 25, 2020).

APPLICATION:

The Plaintiff, Dallas, is claiming excessive force, false charges, and conspiracy to bring false charges. The claims are against police officer Defendants, Austin and Houston, who were on site where the incident occurred. Plaintiff claims that Houston used excessive force against him, and then concealed his excessive force by fabricating evidence in order to bring false charges against Dallas. Plaintiff further claims that Austin conspired with Houston to bring false

charges for the purpose of concealing Houston's use of excessive force.¹ Officer Austin moved for summary judgement on the conspiracy claim, arguing, in part, that the intracorporate conspiracy doctrine barred his liability. The Report and Recommendation of the Magistrate Judge did not reach Austin's argument about the doctrine.

I found three cases from the Fifth Circuit, with similar facts to this case, in which the court found that the exception applied. Read together, these three cases—*Bright*, *Cornett*, and *Collins*—stand for the proposition that the exception applies when officers conspire to tamper with or falsify evidence for the purpose of concealing their own wrongdoing. Because this case involves very similar circumstances as *Bright*, *Cornett*, and *Collins*, those three cases can guide the Court's analysis, and point to the conclusion that the intracorporate conspiracy is no bar to liability here.

***Bright* comparison**

The first case that can guide the Court's analysis is *Bright*. *Bright*, 532 F. Supp. 3d at 402. In *Bright*, the plaintiff pled that the deceased's rights were violated when an officer allegedly concealed and altered evidence in the death of the deceased after the police raid. *Id.* at 395. A SWAT officer executed a search warrant and during the raid, the officer tampered with evidence. *Id.* at 394-95. The other officers allegedly conspired with him to conceal their use of excessive force for shooting an individual. *Id.* at 402. The court held that the plaintiff's allegations were sufficient to plead the exception to the intracorporate conspiracy doctrine because the first officer engaged in unauthorized acts when he tampered with evidence. *Id.* The reasoning was that tampering with evidence and depriving the plaintiff of his constitutional

¹ For purposes of this memo, I assume that Plaintiff's allegations of conspiracy are true.

rights would be, an agent of an entity, engaging in unauthorized acts pursuant to the exception and thus the doctrine would not bar liability. *Id.*

The facts of this case are strikingly similar to *Bright*. Like *Bright*, in which the officer engaged in a conspiracy with another to conceal misconduct related to a shooting, here Austin conspired with another officer to conceal excessive force. *Id.* 402. Violating the plaintiffs' rights and concealing those violations through evidence tampering or false charges are not authorized acts within the scope of an officer's employed duties. *Id.* In summary, the officers reached an understanding to cover up their actions for the shooting and death of an unarmed individual, to then frame a narrative to conceal their misconduct. *Id.* Similarly, Austin conspired with Houston to cover up the excessive force used against Dallas. *Id.* 402. Houston's falsification of evidence was not within the scope of his employment and therefore the intracorporate conspiracy doctrine will not apply here.

***Cornett* comparison**

The second case that can guide the Court's analysis is *Cornett*. *Cornett*, 2020 WL 906290, at *4. In *Cornett*, the plaintiff brought an action against a defendant police officer for excessive force, false arrest, and conspiracy. *Id.* at *1. The plaintiff alleged that the defendant police officer used excessive force, and then acted in concert with another to conceal that force by fabricating evidence in a police report and claiming their body cameras malfunctioned. *Id.* at *3. The police officers argued that the intracorporate conspiracy doctrine barred their liability. *Id.* The court refused to apply the doctrine to a conspiracy to conceal the misconduct of a police officer, and reasoned that the doctrine does not apply when an officer exceeds the boundaries of their authority to cover up their unauthorized conduct. *Id.* at *4.

Like *Cornett*, in which the officer acted in concert with another to conceal their use and justification of a taser, here Austin acted in concert with Houston to conceal Houston's excessive force against Dallas. *Id.* at *3. Moreover, the purpose of the conspiracy in both cases is fabricating evidence—in *Cornett*, falsifying a police report about malfunctioned body cameras, here, Austin's report in favor of Houston, which was supported by the fabrication of evidence. *Id.* The exception likely applies when an officer fabricates evidence in either their own interest to conceal misconduct or in order to protect another officer. *Id.* at *4. In summary, tampering with evidence and falsifying a police report to conceal misconduct, are unauthorized acts in the personal interest of the reporting agent—for oneself—or on behalf of another officer. *Id.* Therefore, Houston's fabrication of evidence to cover up his own misconduct will likely be an unauthorized act, and so the exception will apply to Austin's conspiracy to participate in that cover up. *Id.*

***Collins* comparison**

The third case that can guide the Court's analysis is *Collins*. *Collins*, 2012 WL 443010, at *8. In *Collins*, the two officers conspired to deprive the plaintiff of their rights to be free from excessive force. *Id.* While the officers conspired to use excessive force, the purpose of the conspiracy was to conceal the force used against the plaintiff. *Id.* The court held that the plaintiff's complaint was sufficient for the exception to the intracorporate conspiracy doctrine to apply. *Id.* at *9. The reasoning was that the officers conspired to cover up their illegal acts of constitutional violations against the plaintiff. *Id.*

Like *Collins*, in which the officers conspired to cover up these unauthorized acts of excessive force, here Austin conspired to bring false charges against Plaintiff to cover up Houston's excessive force. *Id.* at *8. Moreover, where there is excessive force, the officers are

exceeding their capacities as officers and are consequently participating in illegal acts, in addition to conspiring to conceal these illegal acts. *Id.* For that reason, the conspiracy to conceal these acts—which advances the interest of oneself rather than the entity—are situations where the exception applies. *Id.* Hence, conspiring to conceal illegal acts such as excessive force are illustrations for unauthorized acts.

In summary, these three cases—*Bright*, *Cornett*, and *Collins*—are cases when the exception applies, where officers conspire to tamper with or falsify evidence for the purpose of concealing their own wrongdoing. Additionally, I did not find any cases stating the exception would not apply to the facts of this case. As this present case has a strong correlation to *Bright*, *Cornett*, and *Collins*, these cases strongly support the conclusion that the intracorporate conspiracy does not bar liability here.

CONCLUSION:

The intracorporate conspiracy doctrine does not bar Plaintiff's conspiracy claim against Austin because the exception to the doctrine applies in the present case. Accordingly, Austin conspired with another officer with the purpose to bring false charges in order to conceal misconduct of excessive force.

Joseph Ulloa Writing Sample

PSTM5838FA22

No. 22-0970

In the
Supreme Court of Texas

Dixie B. Herbster,
Petitioner,

v.

The University of South-Central Texas,
Respondent.

From the Fifteenth District Court of Appeals, Cause No. 2022-16-6789,
and the 82nd District Court for Luna County,
Cause No. DC-22-12345, Honorable Grace Bouquett

Petition for Review

Dixie Herbster Counsel:
Awesome Associate
Goldburg, Hayman & Leisnar
316 Main Street, Suite 200
Dallas, Texas 75220

PSTM5838FA22

IDENTITY OF PARTIES AND COUNSEL

The following constitutes a list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

Petitioner	Dixie B. Herbster
Petitioner's trial counsel	(Dixie Lawyer)
Petitioner's appellate counsel	Dixie Herbster Counsel: Awesome Associate Goldburg, Hayman & Leisnar 316 Main Street, Suite 200 Dallas, Texas 75220
Respondent	The University of South-Central Texas
Respondent's trial counsel	(USCT Lawyer)
Respondent's appellate counsel	USCT Counsel: Lesser Associate Big Law Firm 987 Jones Road, Suite 1000 Dallas, Texas 75220
Other parties	Not applicable
Counsel for other parties	Not applicable

PSTM5838FA22

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL	1
INDEX OF AUTHORITIES.....	3
STATEMENT OF THE CASE.....	4
STATEMENT OF JURISDICTION.....	4
ISSUES PRESENTED.....	5
<p>Issue 1: The ramp without handrails posed an unreasonable risk of harm where injuries arose out of the uninspected ramp provided by the law school.</p> <p>Issue 2: The law school’s sovereign immunity will be waived where they are liable for personal property injury so caused by a condition or use of the ramp.</p>	
STATEMENT OF FACTS	5, 6
SUMMARY OF THE ARGUMENT	7
ARGUMENT AND AUTHORITIES.....	8
PRAYER FOR RELIEF	25
CERTIFICATE OF SERVICE	26

PSTM5838FA22

INDEX OF AUTHORITIES

Cases	Page
<i>City of Dallas v. Thompson</i> , 210 S.W.3d 601 (Tex. 2006)	8, 15, 16
<i>County of Cameron v. Brown</i> , 80 S.W.3d 549 (Tex. 2002)	14, 15
<i>Dallas Cnty. Mental Health & Mental Retardation v. Bossley</i> , 968 S.W.2d 339 (Tex. 1998)	19, 23, 24
<i>Kerrville State Hosp. v. Clark</i> , 923 S.W.2d 582 (Tex. 1996)	9, 10
<i>Lowe v. Texas Tech Univ.</i> , 540 S.W.2d 297 (Tex. 1976)	8, 9
<i>Overton Mem'l Hosp. v. McGuire</i> , 518 S.W.2d 528 (Tex. 1975)	12
<i>Robinson v. Central Texas MHMR Center</i> , 780 S.W.2d 169 (Tex. 1989)	10, 11
<i>Salcedo v. El Paso Hospital District</i> , 659 S.W.2d 30 (Tex. 1983)	7, 8
<i>Sampson v. Univ. of Tex. at Austin</i> , 500 S.W.3d 380 (Tex. 2016)	7, 16, 17
<i>Scott & White Mem'l Hosp. v. Fair</i> , 310 S.W.3d 411 (Tex. 2010) ...	8, 17, 18, 19
<i>United Supermarkets, LLC v. McIntire</i> , 646 S.W.3d 800 (Tex. 2022)	8, 13, 14
<i>Univ. of North Texas v. Harvey</i> , 124 S.W.3d 216 (Tex. App.-Fort Worth 2003, pet. denied)	19, 21, 22
<i>Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones</i> , 485 S.W.3d 145 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)	19, 22, 23
<i>University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie</i> , 578 S.W.3d 506 (Tex. 2019)	19, 20, 21
<i>University of Texas Medical Branch v. York</i> , 871 S.W.2d 175 (Tex. 1994)	8
Statutes and other authorities	
Tex. Civ. Prac. & Rem. Code Ann. § 101.021	7, 19
Tex. Gov't Code Ann. § 22.001(a)(6)	4

PSTM5838FA22

STATEMENT OF THE CASE

Nature of the case: This is a suit for negligence arising from a defective ramp on University grounds.

Trial Court: The Honorable Grace Bouquett, 82nd Judicial District Court, Luna County, entered a final summary judgment in favor of defendant's motion to dismiss.

Court of Appeals: Fifteenth Court of Appeals, Toyahville

Parties in the Court of Appeals: Appellant[s]: Dixie B. Herbster
Appellee[s]: The University of South-Central Texas

Disposition: Kelly, J., Rudnicki, J., and Vogelsang, CJ. Vogelsang, Chief Justice, in which Rudnicki, J. authored the court's opinion. Justice Kelly provided a separate opinion. The court of appeals affirmed the judgment below.

Status of opinion: The court's opinion is unpublished. Dixie B. Herbster v. University of South-Central Texas, 123 S.W.3d 123, 124 (Tex. App. – Toyahville 2022, pet. filed).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to section 22.001(a)(6) of the Texas Government Code.

PSTM5838FA22

ISSUE PRESENTED**Issue 1: Unreasonable Risk of Harm**

The court of appeals erred in affirming the district court's judgment because Dixie's injuries arose out of a dangerous ramp provided by the law school. The petitioner will surpass the school's immunity in which they are liable—as the ramp posed an unreasonable risk of harm.

Issue 2: Sovereign immunity

The court of appeals affirming the district court's judgment to waive the law school's sovereign immunity under the Texas Tort Claims Act shall not be reversed, because a governmental unit in the state is liable for personal property injury so caused by a condition or use of tangible personal property.

STATEMENT OF FACTS

The Honorable Grace Bouquett, 82nd Judicial District Court, Luna County, entered a final summary judgment in favor of defendant's motion to dismiss. The Fifteenth Court of Appeals affirmed the judgment.

A. The school encouraged students to study during the break and use school facilities in a winter storm.

Though there was a winter storm with frozen precipitation, the day the Herbsters studied at the library-the school left the law school doors unlocked for students to study. Exhibit 1, Dixie Herbster Deposition. 2:4,11. To get into the school, the sign next to the ramp encouraged Dixie Herbster to use the ramp instead of the stairs because the sign reassured her of its safe, slip-resistant ramp. Ex. 1, Herbster Dep. 3:15-18.

PSTM5838FA22

B. Willie, a University employee, designed a ramp without rails to be used for the ice storm even though he was in charge of resolving unsafe hazards on school grounds.

Willie, the head groundskeeper, is responsible for the school grounds and should have known safe procedures with his experience-seven years as staff groundskeeper and four years as maintenance on campus. Exhibit 2, Willie Redbeard Deposition 1:4,8-11. Willie designed the ramp, for its sole purpose, to be used for the ice storm. Ex. 2, Redbeard Dep. 2:21-23.

C. Willie lacked an engineering background to build a ramp for pedestrian use and the Dean knew the ramp would be used on school grounds.

Willie lacked an engineering background to build the ramp and the Assistant Dean knew Willie built the ramp for it to be used for the storm. Ex. 2, Redbeard Dep. 3:4-5, 3:12-16.

D. Willie placed a ramp without handrails for pedestrian use that was made from abrasive material, yet he added sand to the ramp.

The ramp Willie built did not have any handrails for proper safety and was tall enough to cover the entire staircase. Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. Willie said that the ramp had great surface material for traction. Ex. 2, Redbeard Dep. 4:1-2. Willie sanded the ramp the night before even though the ramp was already coated with a sandpaper abrasive material. Ex. 2, Redbeard Dep. 4:4-5, 9-10.

E. Willie, with the Dean's support, set out the ramp for its first time use without an inspection test and created a sign to encourage pedestrians to use the ramp.

Willie did not sand the stairs for the storm because he wanted to encourage people to test the hazardous ramp. Ex. 2, Redbeard Dep. 4:11-12. Willie tested the ramp for the first time, without proper safety trials, the night of the storm. Ex. 2, Redbeard Dep. 4:13-15. Willie, with the Assistant Dean's support, set out the ramp for students to use because the school knew students would study over the break. Ex. 2, Redbeard Dep. 4:23-25. Willie posted a sign next to

PSTM5838FA22

the ramp to encourage people to use it, instead of another walkway during the storm. Ex. 2, Redbeard Dep. 4:15, 5:2-5.

F. Dixie suffered injuries from the school's personal property, the ramp without rails.

Dixie trusted the ramp to be safe because the school allowed the encouragement sign to stay up. Ex. 1, Herbster Dep. 3:20-21. As Dixie was stepping off the ramp, she slipped, fell, and hit her head. Ex. 1, Herbster Dep. 4:10-11. As a result, Dixie was hospitalized for a concussion and neck herniation, which risks her future brain health. Ex. 1, Herbster Dep. 4:12-16, 24.

SUMMARY OF ARGUMENT

The law school claimed that it was immune under the Texas Tort Claims Act because Dixie's injuries were not caused by "the condition or use of tangible personal property," however her injuries did arise out of the "condition" and "use" of the ramp. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). First, the ramp had no rails which is a condition of tangible personal property because a ramp without rails is property that's in a "defective condition." *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30, 32 (Tex.1983). Second, the law school did not exercise reasonable care because they negligently provided an uninspected ramp that involved "some condition or some use" of the ramp for pedestrians. *Id.* at 33. And third, the placement of the ramp on school grounds created a condition of real property, a "premises defect," that resulted in a slip and fall. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 391 (Tex. 2016). Further, the added sand on top of the ramp's abrasive surface created another condition that posed an unreasonable risk of harm for a pedestrian, and therefore proximately caused Dixie to slip and fall. *Id.* The Court should reverse the judgment of the court of appeals and remand this case to the trial court, because the ramp's use and condition posed an unreasonable risk of harm for Dixie that created an issue of material fact that precludes summary judgement.

PSTM5838FA22

ARGUMENT

- I. This Court should reverse and remand because the ramp posed an unreasonable risk of harm for Dixie and caused her slip and fall injuries.**

OMITTED FOR BREVITY

- II. This Court should affirm the law school’s waiver of sovereign immunity under the Texas Tort Claims Act (TTCA) because as a state entity, they are liable for personal property injury so caused by a condition of use of tangible personal property.**

Under Section 101.021(2) of the TTCA, state entities will waive immunity for particular tort claims involving personal injury caused by the use or condition of real property “if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). Governmental immunity will be waived when the injury is “immediate and directly” related to the condition or use of property. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998). Immunity is waived when a state entity employee “improperly uses” otherwise non-defective property to cause injury or provides “property in a defective or inadequate condition” causing injury. *University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 513 (Tex. 2019). When a tangible personal property is in a “inadvertent state, i.e., a condition,” —which makes the property less safe from missing an integral safety component—and causes injury, then a state entity will waive immunity. *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 223 (Tex.App.-Fort Worth 2003, pet. denied). To activate a waiver of immunity, there must be a “reasonable inference” that the use of tangible personal property proximately caused the party’s injuries. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones*, 485 S.W.3d 145, 152 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

When an employee provides property in an inadequate or defective condition causing harm, then there is state actor liability. *McKenzie*, 578 S.W.3d at 513. In *UT M.D. Anderson v.*

PSTM5838FA22

McKenzie, the Court held that the state entity's negligent use of tangible personal property caused harm, as required for a state entity to waive sovereign immunity from suit. *Id.* at 518. The injured party alleged that the state entity was negligent in misusing a fluid, a tangible physical property, to administer chemotherapy. *Id.* at 510. This posed a significant risk of harm to the patient. *Id.* As a result of the misuse of that tangible physical property, the patient died. *Id.* The court reasoned that the injured party presented evidence that the state entity used property that should not have been used and caused the injury. *Id.* at 514. Thus, immunity is waived when an employee "improperly uses" otherwise non-defective property to cause injury or provides "property in a defective or inadequate condition" causing injury. *Id.* at 513.

In connection with *McKenzie*, where the Court found a nexus between the injury and the state entity's use of a tangible property, a certain carrier agent, here there is a link between Dixie's injury and the University's use of a hazardous ramp. *McKenzie*, 578 S.W.3d at 515; Ex. 1, Herbster Dep. 4:10-11. The Court found that without the use of the carrier agent, then the injury would not have occurred. *Id.* at 516. Similarly, in *McKenzie*, where the state entity used tangible property that should not have been used, here the University used the ramp, tangible property, that should not have been used under the circumstances because it had no rails, no inspection, and sand added to it. *Id.* at 514; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2, 4:13-15. The ramp's material was made from an abrasive material, so there was no reason to add sand to it. Ex. 2, Redbeard Dep. 4:4-5, 9-10. First, if Dixie had not used the ramp, then she would have used the stairs, yet the ramp was implemented and as a result she suffered an injury. Ex. 1, Herbster Dep. 4:10-16, 24. Second, the ramp is abrasive material, yet sand was added, and if sand would not have been added, then the abrasive material could have assisted her not to slip. Ex. 2, Redbeard Dep. 4:1-2, 4-5, 9-10. Third, there were no handrails to balance herself and

PSTM5838FA22

lastly no inspection test. Ex. 2, Redbeard Dep. 4:13-15. The actual use of the ramp—with no rails, no inspection test, and sand added—altogether linked to Dixie’s injuries because the University created an unreasonable risk of harm for pedestrians to only use the hazardous ramp. Ex. 1, Herbster Dep. 4:12-16, 24; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2, 4:4-5, 4:9-10, 4:13-15. Therefore, the University, as a state entity, waived their sovereign immunity under *McKenzie*. *Id.* at 518.

Providing a condition-of-tangible-personal-property that cause injuries will constitute liability. *Univ. of N. Tex.*, 124 S.W.3d at 224. In *Univ. of N. Tex. v. Harvey*, the Court of Appeals held that a negligence action against a university arising from a case of food poisoning —based on lack of an ice scoop for ice barrels—properly invoked waiver of sovereign immunity. *Id.* at 220. Harvey, the injured party, contends that the state university provided defective tangible personal property, the ice barrels, when the barrels lacked an integral safety component, a scoop, which then caused the injured party’s poisoning. *Id.* at 223. The Court found the lack of a scoop for the ice barrels was an “intentional or inadvertent state, i.e., a condition,” which made the barrels less safe, because the bacteria on hands gets on ice, which will then cause food poisoning. *Id.* at 224. Thus, where evidence and facts activates a condition-of-tangible-personal-property and that condition of the barrels is the proximate cause of a party’s injuries, then the state actor will be liable. *Id.* at 224.

With respect to *Univ. of N. Tex.*, where negligence arises from a defective tangible property that a university provided, here the University was negligent when they provided a defective ramp without handrails. *Univ. of N. Tex.*, 124 S.W.3d at 224; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. In *Univ. of N. Tex.*, the university provided defective personal property when they provided an ice barrel without a scoop, an integral safety component. *Id.* at 224. Similarly, in the

PSTM5838FA22

present case, the University provided defective property when they provided a ramp without handrails, an integral safety component for pedestrians to balance themselves walking the ramp. *Univ. of N. Tex.*, 124 S.W.3d at 224; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. Moreover, the University needlessly added sand to the ramp when the surface was already abrasive and as a result Dixie slipped and fell. Ex. 1, Herbster Dep. 4:10-16; Ex. 2, Redbeard Dep. 4:4-5, 9-10. The rails are a condition of the tangible ramp, because the rails provide support to pedestrians. Without them, the ramp is inadequate which makes the ramp less safe to walk on, especially during an ice storm. Therefore, the condition-of-tangible-personal-property like a ramp without handrails is the proximate cause of Dixie's injuries because the defective ramp lacked rails for her to walk safely during the ice storm. *Univ. of N. Tex.*, 124 S.W.3d at 224; Ex. 1, Herbster Dep. 4:10-16; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. The Court should find the University waived immunity for using a defective ramp that led to injuries in a slip and fall. *Id.* at 224.

In *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones*, the Court of Appeals held that a state university provided a drug to the participant, that was sufficient use of a tangible property to which the drug caused injuries, to find waiver of immunity. *Jones*, 485 S.W.3d at 152. The injured party participated in a study where the state entity negligently provided the injured party a drug, which should not have been administered due to the injured party's depression. *Id.* at 152. The Court found that there was a nexus between the state entity's use of tangible property and the injuries suffered. *Id.* Thus, there must be a reasonable inference that the use of tangible personal property proximately caused the party's injuries to activate a waiver of immunity. *Id.*

In correlation with *Jones*, the court held that there must be a nexus between the state entity's use of tangible property and the injuries suffered, similarly here a student suffered injuries when they fell off a ramp the University provided which had no rails and sand added to

PSTM5838FA22

its abrasive surface. *Jones*, 485 S.W.3d at 152; Ex. 1, Herbster Dep. 4:10-11; Ex. 2, Redbeard Dep. 3:23-25, 4:1-5, 9-10. There is no other reasonable inference other than the use of tangible property of the University's ramp that could have caused her injuries because she was still on the ramp as she slipped and fell. Ex. 1, Herbster Dep. 4:10-11; Ex. 2, Redbeard Dep. 2:21-23. Furthermore, the employee, Redbeard, added sand to the ramp which builds to the nexus between use of the ramp and Dixie's slip and fall injuries. *Id.* at 152; Ex. 1, Herbster Dep. 4:10-11; Ex. 2, Redbeard Dep. 4:4-5, 9-10. Hence, the use of tangible property—such as a ramp without handrails and sand on it —proximately caused Dixie's injuries to trigger a waiver of the University's immunity. *Id.* at 152; Ex. 1, Herbster Dep. 4:12-16, 24; Ex. 2, Redbeard Dep. 4:1-5, 9-10.

An injury must be directly correlated to the property missing an integral safety component. *Bossley*, 968 S.W.2d at 343. In *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, the Supreme Court of Texas held that the injured party's death, with the Hillside center's unlocked interior doors, was not caused by the condition or use of property. *Id.* at 343. The entity's employees failed to restrain the patient and he escaped from the Hillside center. *Id.* As a result, he ran in front of a truck. *Id.* at 343. The Court found that the death was distant from the doors temporally, geographically, and causally. *Id.* Nonetheless, the injury must be "immediate" and "directly related" to property lacking an integral safety component. *Id.* Thus, a state entity's immunity is waived only when injuries are "immediate" and "directly related" to property lacking an integral safety component. *Id.*

The Respondent's reliance on *Bossley* is misplaced. The Respondent relies on *Bossley* to argue that the injuries are distant and not caused by the ramp. *Bossley*, 968 S.W.2d at 343. Unlike *Bossley*, where the injuries and death were distant temporally, geographically, and

PSTM5838FA22

casually, here Dixie's injuries from her slip and fall were "immediate" and "directly related" to the ramp without handrails. *Bossley*, 968 S.W.2d at 343; Ex. 1, Herbster Dep. 4:10-11. In *Bossley*, the employees left the doors unlocked and the injured party was far from the doors, however, here Dixie was proximate to the ramp after her fall. *Id.* at 343. She testified that she was still on the ramp as she slipped, fell, and hit her head. Ex. 1, Herbster Dep. 4:10-11. Thus, Dixie's injuries were proximate to the ramp that had been sanded even though the ramp is an abrasive surface. Ex. 2, Redbeard Dep. 4:1-5. Therefore, Dixie's injuries must be "immediate and directly related" to the ramp lacking handrails—an integral safety component—for pedestrians to keep balance walking the ramp. *Bossley*, 968 S.W.2d at 343. The Court should distinguish *Bossley* from the present case because Dixie's injury was "immediate" and directly connected to a missing integral safety component. *Id.* at 343. The Court should therefore find the University waived their sovereign immunity through the ramp that created an issue of material fact that precludes summary judgement. *Id.*

PSTM5838FA22

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court reverse the judgment of the court of appeals and remand this case to the trial court for additional proceedings.

Respectfully submitted,
Awesome Associate

Dixie Herbster Counsel:
Awesome Associate
Goldburg, Hayman & Leisnar
316 Main Street, Suite 200
Dallas, Texas 75220

PSTM5838FA22

CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Review was served on Respondent the University of South-Central Texas, through counsel of record, Lesser Associate, 987 Jones Road, Suite 1000 Dallas, Texas 75220, by US. Mail on [date mailed].

Awesome Associate

PSTM5838FA22

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this Petition for Review contains 7,473 words. This is a computer-generated document created in Microsoft Word, using 12-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

Awesome Associate

Applicant Details

First Name	William											
Last Name	Ulrich											
Citizenship Status	U. S. Citizen											
Email Address	wulrich@nd.edu											
Address	<table><tr><td>Address</td></tr><tr><td>Street</td></tr><tr><td>2708 River Ridge Dr.</td></tr><tr><td>City</td></tr><tr><td>Waukesha</td></tr><tr><td>State/Territory</td></tr><tr><td>Wisconsin</td></tr><tr><td>Zip</td></tr><tr><td>53189</td></tr><tr><td>Country</td></tr><tr><td>United States</td></tr></table>	Address	Street	2708 River Ridge Dr.	City	Waukesha	State/Territory	Wisconsin	Zip	53189	Country	United States
Address												
Street												
2708 River Ridge Dr.												
City												
Waukesha												
State/Territory												
Wisconsin												
Zip												
53189												
Country												
United States												
Contact Phone Number	4145873681											

Applicant Education

BA/BS From	St. Norbert College
Date of BA/BS	May 2021
JD/LLB From	Notre Dame Law School
	http://law.nd.edu
Date of JD/LLB	May 18, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Notre Dame Journal on Emerging Technologies
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Gallagher, Kari
kgallag1@nd.edu

Kozel, Randy
rkozel@nd.edu

574-631-6749

Duffy, John
jfduffy@law.virginia.edu
(434) 243-8544

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William J. Ulrich
2708 River Ridge Drive
Waukesha, WI 53189
(414) 587-3681
wulrich@nd.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a third-year student at Notre Dame Law School. I am writing to apply for a position as a law clerk in your chambers for the 2024–25 term.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. Also enclosed are letters of recommendation from the following people:

Prof. John Duffy
UVA School of Law

Prof. Kari Gallagher
Notre Dame Law School

Prof. Randy Kozel
Notre Dame Law School

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

William Ulrich

WILLIAM J. ULRICH

2708 River Ridge Dr. | Waukesha, WI | (414) 587-3681 | wulrich@nd.edu

EDUCATION

University of Notre Dame Law School

Juris Doctor Candidate

GPA: 3.630

Honors: Honor Roll (Fall 2022)

Activities: Notre Dame Journal on Emerging Technologies, Executive Editor, Vol. 5; Intellectual Property Law Society

Note: The Price of Competition: Analyzing Anticompetitive Tactics in Pharmaceutical Markets in the Hatch-Waxman Era, 4 NOTRE DAME J. EMERGING TECHS. (forthcoming 2023)

Notre Dame, IN

August 2021 – May 2024

St. Norbert College

Bachelor of Science in Biochemistry, summa cum laude, with Minor in Mathematics

GPA: 3.98

Coursework: Chemistry, Organic Chemistry, Biochemistry, Physical Chemistry, Genetics, Physics, Microbiology

De Pere, WI

August 2017 – May 2021

EXPERIENCE

Foley & Lardner, LLP

Summer Associate

- Intellectual Property Litigation group

Milwaukee, WI

May 2023 – July 2023

Elkhart County Prosecuting Attorney's Office

Legal Intern

- Researched and summarized case law in memorandums on topics including the Confrontation Clause and third-party consent to searches to assist Deputy Prosecutors in preparation for trials
- Attended five criminal trials to observe courtroom behavior when addressing the jury, questioning witnesses on direct and cross examination, and arguing evidentiary matters before the judge

Elkhart, IN

May 2022 – July 2022

Michael Best & Friedrich, LLP

Firm and Practice Management Intern

- Compiled, analyzed, and presented data regarding law firms in foreign jurisdictions involved in conducting foreign patent prosecution to identify high-performing firms and areas for business consolidation and expansion
- Designed and tested Matter Management software used to automate budget and profitability tracking for large matters

Milwaukee, WI

May 2021 – August 2021

St. Norbert College, Department of Chemistry

Teaching Assistant to Professor Matthew Sprague

- Prepared, administered, and explained weekly labs to twenty-four general chemistry students
- Hosted office hours to help students understand and master general chemistry subject matter

De Pere, WI

August 2019 – May 2021

St. Norbert College, Department of Mathematics

Poss Wroble Fellowship

- Conducted research to expand and further develop the mathematics concept of Lanchester's Combat Model, using principles of multi-variable calculus, ultimately forming an improved model using differential equations to describe decreasing army sizes during battle
- Presented the research results to department faculty and students as part of a colloquium series in such a manner as to allow an audience with varying levels of mathematic proficiency to appreciate the results

De Pere, WI

May 2020 – August 2020

ADMISSIONS

United States Patent and Trademark Office (USPTO)

INTERESTS

Golf (played competitively through high school and continue to play recreationally); Cheering on the Green Bay Packers

Ulrich, William J.

Student ID: XXXXX1870

Birth Date: 08-18-XXXX

Date Issued: 01-JUN-2023

Page: 1

Issued To: William Ulrich
Parchment DocumentID: TWB5KLCJ
wulrich@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS			OVERALL TOTALS		
					ATTEMP HRS	EARNED HRS	GPA	ATTEMP HRS	EARNED HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:										
Fall Semester 2021										
Law School										
LAW 60105	Contracts	4.000	B+	13.332						
LAW 60302	Criminal Law	4.000	B+	13.332						
LAW 60703	Legal Research	1.000	A-	3.667						
LAW 60705	Legal Writing I	2.000	A-	7.334						
LAW 60901	Torts	4.000	B	12.000						
	Total			49.665	15.000	15.000	3.311	15.000	15.000	3.311
Spring Semester 2022										
Law School										
LAW 60307	Constitutional Law	4.000	A-	14.668						
LAW 60308	Civil Procedure	4.000	B+	13.332						
LAW 60707	Legal Resrch & Writing II-MC	1.000	A-	3.667						
LAW 60906	Property	4.000	A-	14.668						
LAW 70318	Legislation & Regulation	3.000	A-	11.001						
	Total			57.336	16.000	16.000	3.584	31.000	31.000	3.452
Fall Semester 2022										
Law School										
LAW 70101	Business Associations	4.000	A-	14.668						
LAW 70102	Accounting for Lawyers	2.000	A	8.000						
LAW 70137	Trademark & Unfair Comp	3.000	A-	11.001						
LAW 70507	Trusts and Estates	3.000	A-	11.001						
CONTINUED ON PAGE 2										

CONTINUED ON PAGE 2

Ulrich, William J.

Student ID: XXXXX1870


Birth Date: 08-18-XXXX

Date Issued: 01-JUN-2023

Page: 2

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS			OVERALL TOTALS		
					ATTEMP HRS	EARNED HRS	GPA	ATTEMP HRS	EARNED HRS	GPA
University of Notre Dame Information continued:										
LAW 70807	Professional Responsibility	3.000	A	12.000						
LAW 75750	Journal Emerging Technologies	1.000	S	0.000						
	Total			56.670	16.000	16.000	3.778	47.000	46.000	3.558
Honor Roll										
Spring Semester 2023										
Law School										
LAW 70117	Antitrust Law	3.000	A	12.000						
LAW 70439	Intl and Comparative IP Law	3.000	A	12.000						
LAW 70909	Patent Law	3.000	A	12.000						
LAW 75709	Trial Advocacy Comprehensive	4.000	S	0.000						
LAW 75750	Journal Emerging Technologies	1.000	S	0.000						
	Total			36.000	14.000	14.000	4.000	61.000	55.000	3.630
Fall Semester 2023										
IN PROGRESS WORK										
LAW 70201	M Evidence	3.000	IN PROGRESS							
LAW 70203	M Remedies	3.000	IN PROGRESS							
LAW 70311	M Federal Courts	3.000	IN PROGRESS							
LAW 73909	M Patent Litigation	3.000	IN PROGRESS							
LAW 75715	M Deposition Skills	3.000	IN PROGRESS							
LAW 75750	M Journal Emerging Technologies	1.000	IN PROGRESS							
	In Progress Credits	16.000								
***** TRANSCRIPT TOTALS *****										
NOTRE DAME		Ehrs:	61.000	QPTS:	199.671					
		GPA-Hrs:	55.000	GPA:	3.630					
TRANSFER		Ehrs:	0.000	QPTS:	0.000					
		GPA-Hrs:	0.000	GPA:	0.000					
OVERALL		Ehrs:	61.000	QPTS:	199.671					
		GPA-Hrs:	55.000	GPA:	3.630					
***** END OF TRANSCRIPT *****										

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE AND BLUE SEAL ARE DISTORTED



CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

- I0

Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
- U

Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
- Grades which are not included in the Computation of the Average

S

Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

V

Auditor (Graduate students only).

W

Discontinued with permission. To secure a "W" the student must have the authorization of the dean.

P

Pass in a course taken on a pass-fail basis.

NR

Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.

NC

No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradeinfo.php>

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory distribution ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradeinfo.php>

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.

The most frequently used codes are:

AF

Angers, France

DC

Washington, DC

FA

Fremantle, Australia

IA

Innsbruck, Austria

IR

Dublin, Ireland

LA

London, England (Fall/Spring)

LE

London, England (Law-JD)

LG

London, England (Summer EG)

LS

London, England (Summer AL)

PA

Perth, Australia

PM

Puebla, Mexico

RE

Rome, Italy

RI

Rome, Italy (Architecture)

SC

Santiago, Chile

SP

Toledo, Spain

For a complete list of codes, please see the following website:
<http://registrar.nd.edu/pdf/campuscodes.pdf>

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:
<http://registrar.nd.edu/students/gradeinfo.php>

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.

TO TEST FOR AUTHENTICITY: This transcript was delivered through Parchment, Inc. The original transcript is in electronic PDF form. The authenticity of the PDF document may be validated. Please see the attached cover letter for more information. A printed copy cannot be validated.

The document cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974.

ALTERATION OF THIS DOCUMENT MAY BE A CRIMINAL OFFENSE!

St. Norbert College
De Pere, WI 54115

Date Issued:01-MAY-2023 OFFICIAL

Record of : William Joseph Ulrich

** Warning - No Address **

Course Level : Undergraduate

Current Program

Degree : Bachelor of Science

Major:
Chemistry Biochemistry

Maj/Concentration:
Biochemistry

Minor:
Mathematics

Degree Information:

Degree Awarded Bachelor of Science 16-MAY-2021

Primary Degree

Major:
Chemistry Biochemistry

Maj/Concentration:
Biochemistry

Minor:
Mathematics

Inst. Honors:
Graduate of the Honors Program
Summa Cum Laude

Subj	No.	Title	Cred	Grade	Pts	R
------	-----	-------	------	-------	-----	---

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

AP Exam Advanced Placement (AP)

CHEM 100	Applications of Chemistry +L	4.00	AW
MATH 131	Calculus + Analytic Geometry 1	4.00	AW
SSCI 224	Basic Statistics	4.00	AW

Earned Hrs	GPA-Hrs	QPts	GPA
12.00	0.00	0.00	0.00

IB Exam International Baccalaureate

BIOL 193	Biology Elective	4.00	AW
ECON 100	Fundamentals of Economics	4.00	AW
ENGL 149	Intro to Literary Studies	4.00	AW
SPAN 101	Elementary Spanish 1	4.00	AW
SPAN 102	Elementary Spanish 2	4.00	AW

Earned Hrs	GPA-Hrs	QPts	GPA
20.00	0.00	0.00	0.00

Subj	No.	Title	Cred	Grade	Pts	R
------	-----	-------	------	-------	-----	---

INSTITUTION CREDIT:

Fall Semester 2017

BIOL 120	General Biology 1 +L	4.00	A	16.00
CHEM 105	General Chemistry 1 +L	4.00	A	16.00
HONR 101	Introduction to Honors	4.00	A	16.00
MATH 132	Calculus + Analytic Geometry 2	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Spring Semester 2018

BIOL 121	General Biology 2 +L	4.00	AB	14.00
CHEM 107	General Chemistry 2 +L	4.00	A	16.00
MATH 203	Linear Algebra	4.00	A	16.00
PHIL 120	Honors:Phil Fndtns Humn Nature	4.00	A	16.00

Subj	No.	Title	Cred	Grade	Pts	R
------	-----	-------	------	-------	-----	---

INSTITUTION CREDIT:

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	62.00	3.88

Dean's List
GPA Progression OK

Fall Semester 2018

BIOL 244	Genetics +L	4.00	A	16.00
CHEM 220	Organic Chemistry +L	4.00	A	16.00
HONR 3331	Tutorial	2.00	A	8.00
MATH 250	Advanced Foundations Math	4.00	A	16.00
THRS 117	Honors:Theological Foundations	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
18.00	18.00	72.00	4.00

Dean's List
GPA Progression OK

Winter Semester 2019

HONR 3332	Tutorial	2.00	A	8.00
-----------	----------	------	---	------

Earned Hrs	GPA-Hrs	QPts	GPA
2.00	2.00	8.00	4.00

GPA Progression OK

Spring Semester 2019

CHEM 211	Analytical Chemistry	4.00	A	16.00
CHEM 232	Organic Chem Research Emph +L	4.00	A	16.00
MATH 303	Advanced Linear Algebra	4.00	A	16.00
THRS 333	Christian Ethics	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Fall Semester 2019

CHEM 350	Biochemistry 1 +L	4.00	A	16.00
MATH 233	Calculus + Analytic Geometry 3	4.00	A	16.00
PHYS 121	General Physics 1 +L	4.00	A	16.00
PSYC 100	General Psychology	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Spring Semester 2020

AMER 324	Honors: Poverty, Charity + Welfare	4.00	A	16.00
CHEM 310	Organic Chemistry Advanced	4.00	A	16.00
CHEM 351	Biochemistry 2 +L	4.00	A	16.00
PHYS 122	General Physics 2 +L	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Fall Semester 2020

BIOL 350	Microbiology +L	4.00	A	16.00
CHEM 330	Physical Chemistry 1 +L	4.00	A	16.00
HONR 289	The Foster Care System	2.00	S	0.00

St. Norbert College
De Pere, WI 54115

Date Issued:01-MAY-2023 OFFICIAL

Subj	No.	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
MATH	306	Abstract Algebra	4.00	A	16.00	
PHIL	265	Asian Philosophy + Religion	4.00	A	16.00	
Earned Hrs		GPA-Hrs	QPts	GPA		
18.00		16.00	64.00	4.00		
Dean's List						
GPA Progression OK						
Spring Semester 2021						
BUAD	390	Business Law	4.00	A	16.00	
CHEM	332	Physical Chemistry 2 +L	4.00	A	16.00	
POLI	342	Con Law: Civ Rghts + Liberties	4.00	A	16.00	
Earned Hrs		GPA-Hrs	QPts	GPA		
12.00		12.00	48.00	4.00		
Dean's List						
GPA Progression OK						
Transcript Totals		Earned Hrs	GPA Hrs	Points	GPA	
TOTAL INSTITUTION		130.00	128.00	510.00	3.98	
TOTAL TRANSFER		32.00	0.00	0.00	0.00	
OVERALL		162.00	128.00	510.00	3.98	
-----END OF TRANSCRIPT-----						


Lauren Gaecke, Registrar

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to submit this recommendation on behalf of William ("Will") Ulrich. Will was a student in my first-year legal writing course during the 2021-22 school year. Legal writing is unlike many first-year courses in that it is taught in small sections of approximately twenty-four students. Because it is a practical course, it provides opportunities for the instructor to observe how students work with small groups of classmates and with partners. Thus, I had the opportunity to work with Will personally and to observe his interactions with his classmates. I also got to know Will during office hours and through casual, hallway conversations. Will is a clear thinker and writer, with a calm, business-like demeanor. He will make an outstanding law clerk.

The first semester of legal writing consists of several informal written assignments, a midterm objective memo, and a final persuasive brief. From his first assignment, Will demonstrated an ability to identify the critical elements of a legal analysis and apply those elements adeptly to the relevant facts. Will's objective memo continued this trend; it contained a clear recitation of the facts, succinctly set forth the most apt cases, and came to a conclusion in which the reader had confidence. This strong legal analysis was coupled with meticulous editing. Will's persuasive brief also was professionally done. Again, he demonstrated an ability to distill complex legal concepts into straightforward, readable prose. Will's efforts during the first semester earned him an A-, and placed him in the top twenty percent of a very talented group of writers.

The second semester of legal writing is dedicated to writing an appellate brief and presenting an oral argument with a partner. Will's portion of the brief addressed the reliability of an out-of-court identification. Both his facts and argument were clear, logical, and compelling. Will's oral argument also was a professional-quality performance. His argument was well organized, his manner was respectful, and his answers reflected a command of the law and the facts. Will received an A-, and again was in the top twenty percent of a highly competitive class.

Beyond his achievements during first year, Will has continued to develop as a writer and a scholar. Will has written a note for the Journal of Emerging Technologies, and serves as the Journal's Executive Editor. He also passed the patent bar. This is especially impressive given that, during his second year, he earned a 3.778 (first semester) and a 4.0 (second semester) while taking a course load laden with difficult doctrinal classes.

As a career law clerk to a federal appeals court judge, I see many qualities in Will that I value in a co-clerk. Will consistently produces excellent work. Will also has a calm, even-keeled manner; he is not easily flustered or frustrated. He works steadily and plans his work well, so there is no rush when a project is due. Additionally, Will pays attention to detail; any work that he produces will be nit-free. And, finally, Will is genuinely kind and easy to be around.

I recommend Will enthusiastically and without reservation. He will be a welcome addition to any judicial chambers. Please do not hesitate to contact me (574 315 3731 (mobile) or kgallag1@nd.edu) if I can provide additional information that may assist you in making your decision.

All the best,

Kari A. Gallagher
Adjunct Professor of Law

Kari Gallagher - kgallag1@nd.edu

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Will Ulrich, a member of the Notre Dame Law School Class of 2024, who has applied for a clerkship.

I met Will during the fall of his 2L year, when he enrolled in my course on Trademarks and Unfair Competition. Will was an excellent student in my course, both in terms of his exam performance and on a day-to-day basis as a participant in classroom discussions. He is extremely bright, engaged, and amiable, making him both intellectually impressive and a pleasure to speak with.

Will and I have also had many conversations outside the classroom (spurred in part by the fact that we both hail from Wisconsin). We've spoken about law school, professional plans, clerkships, and beyond. In conversations about law and about other topics, Will is invariably bright and thoughtful.

Indeed, his intellectual gifts are undeniable. Will combined his undergraduate degree in Biochemistry with a minor in Mathematics. And he has continued to excel academically at Notre Dame Law School. His cumulative grade point average is impressive on its own, but more remarkable is how Will has managed to raise his GPA every semester during his law school career, most recently earning a perfect 4.0 during the Spring 2023 semester.

In sum, based on my personal experience with Will as well as my admiration of his scholarly achievements, I believe he would excel as a law clerk.

Thank you for receiving this letter, and please let me know if there are any questions I might answer about Will's candidacy.

Sincerely,

Randy J. Kozel

Randy Kozel - rkoz@nd.edu - 574-631-6749

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Will Ulrich as an excellent candidate for a judicial clerkship. Please consider this letter in connection with his application to your chambers.

In the spring semester of 2023, I taught Mr. Ulrich in my patent law class while I was visiting at Notre Dame Law School. The class was a three-credit course that was broadly similar to the four-credit course that I was teaching during the same semester at the University of Virginia School of Law (I was commuting weekly between the two schools). Based on my experience teaching Mr. Ulrich, I can without hesitation recommend him as a top candidate for a judicial clerkship. He would be an especially good candidate for a court with a significant number of patent cases on its docket.

During the semester of my patent law course, Mr. Ulrich was a very frequent participant in class and made very insightful comments. I always had the sense that he wasn't speaking just to hear the sound of his own voice. He was genuinely interested in that material, and he also kept a sense of humor throughout the class. His questions identified (the many!) points where the legal doctrine isn't so clear, and he could form questions that were difficult even for his professor to answer. He was pretty much the perfect student in class: He didn't try to dominate discussions, but he was inevitably involved with excellent comments.

His exam answer did not disappoint. He wrote one of the few "A" answers in the class, and in my subjective comments on the answer (notes I write to myself while I'm blind-grading the answer), I noted that his answer was especially "well written" even for an A answer (I'm quoting from my own notes done while scoring the exam blindly). In the portion of the exam requiring short-answers to more specific questions (a portion of the exam that is easier to grade objectively)—his answers were the best the class by a good margin. In sum, his overall performance made the case for an "A" quite easy.

I can also say with confidence that Mr. Ulrich would also be a top student at other schools too. As I mentioned above, I was simultaneously teaching the same patent law course at UVa, and the exam I used for both classes was identical in parts. (Because the UVa course was a four-credit course that covered additional topics, the UVa exam had an additional question and afforded student more time and more words to answer the exam.) Despite the differences between the UVa and Notre Dame exams, the two were similar enough that I could be certain Mr. Ulrich would have been one of the top students in the UVa class as well. In short, he is an excellent law student by any measure.

Mr. Ulrich has also compiled a distinguished record at Notre Dame generally, but he's really begun to shine in his second year. In his first year of school, he was a B+/A- student, which is well above average given Notre Dame's strict B+ curve. In his second year, however, he's done even better. His grades in the spring semester were all As, not even a single A-, and his grades over the whole year were exclusively A- or A, with a majority of As. I've seen such a pattern in many students who, like Mr. Ulrich, majored in the hard sciences during their undergraduate career. Such students often have a bit of an adjustment to make between the sciences and the law, but once they've made that adjustment, they are terrific. That's what I think you'd get if you hire Mr. Ulrich as a law clerk: He's now much more of an A student than he was in his first year of law school. He'd be even better by the time he would start work in your chambers.

I can also assure you that Mr. Ulrich is a very personable and friendly individual, with a good sense of humor. He relates easily both to his professors and to his classmates and lacks any sense of arrogance or entitlement. In sum, I am confident that he has the personal qualities that will make him a great clerk and lawyer.

If you have any questions regarding Mr. Ulrich or this recommendation, please feel free to contact me at (434) 243-8544 (office) or (202) 669-7987 (cell). Thank you for taking the time to consider his application to your chambers.

Sincerely,

John F. Duffy
Samuel H. McCoy II Professor of Law
Paul G. Mahoney Research Professor of Law
University of Virginia School of Law

Visiting Professor of Law, Spring Semester 2023
Notre Dame Law School

John Duffy - jfduffy@law.virginia.edu - (434) 243-8544

WILLIAM J. ULRICH

2708 River Ridge Dr. | Waukesha, WI | (414) 587-3681 | wulrich@nd.edu

WRITING SAMPLE

Attached is a draft of my Note which was prepared during 2022–23 academic year. The Note is currently in the publication process and will appear in the second issue of Volume 4 of the *Notre Dame Journal on Emerging Technologies*, expected later this year. The Note is solely my work.

THE PRICE OF COMPETITION: ANALYZING ANTICOMPETITIVE TACTICS IN
PHARMACEUTICAL MARKETS DURING THE HATCH-WAXMAN ERA

WILLIAM ULRICH*

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE HATCH-WAXMAN SYSTEM 3

A. Before the Hatch-Waxman Act 3

B. Background and Goals of the Hatch-Waxman Act..... 5

III. TACTICS FOR DELAY 8

A. Pay-for-Delay 9

B. Citizen’s Petitions..... 13

C. Product Hopping 16

D. Authorized Generics..... 20

IV. MOVING FORWARD 22

A. Disclosure as the First Step..... 24

B. Limitations..... 27

V. CONCLUSION..... 27

I. INTRODUCTION

For nearly forty years, the Hatch-Waxman system for expediting approval of generic drugs has brought increased levels of competition to the pharmaceutical markets, lowering drug prices for all consumers. On its face, the Hatch-Waxman Act has enjoyed extraordinary success.

* J.D. Candidate, University of Notre Dame Law School Class of 2024.

Today, nearly 90% of prescriptions are filled with generic pharmaceuticals, with around 80% of all brand-name pharmaceuticals having a generic competitor.¹ Yet, despite this success, anecdotal evidence in recent years suggests that new forms of strategic behaviors designed to block generic entry are on the rise.²

From highly publicized congressional hearings to high profile press articles and outrage from various presidential candidates on the topic, the rising price of pharmaceuticals has led to public outcry. For example, Turing CEO Martin Shkreli and his company riveted the nation after increasing the price of a drug from \$13.50 a tablet to \$750 a tablet, an action that eventually led to congressional hearings on the topic.³ Additionally, pharmaceutical manufacturers' tactics relating to specialty pharmacies and price increases have drawn notice from federal prosecutors, further underscoring the rise of new forms of strategic, anticompetitive behaviors.⁴

It is not difficult to understand the motivation behind such behavior. If a brand-name pharmaceutical manufacturer can delay generic entry for a blockbuster drug—even by just a mere month or two—it stands to earn hundreds of millions of dollars in additional revenue.⁵ With a significant amount of dollars at stake, brand-name manufacturers have a powerful incentive to keep searching for new methods of delaying generic entry into the market. From society's standpoint, this is directly contrary to what one would prefer: instead of brand-name manufacturers using their resources in search of new pathways for treating disease, they instead

¹ See Robin Feldman, *Captive Generics: The Wolf in Sheep's Clothing*, 59 HARV. J. LEG. 383, 384 (2022) [hereinafter Feldman, *Captive Generics*].

² See, e.g., Robin Feldman & Evan Frondorf, *Drug Wars: A New Generation of Generic Pharmaceutical Delay*, 53 HARV. J. LEGIS. 499, 524–54 (2016) [hereinafter Feldman, *Drug Wars*] (pointing out various anticompetitive tactics, including use of the administrative process, regulatory schemes, and drug modification to block or delay generic entry into market).

³ See Robin Feldman, Evan Frondorf, Andrew K. Cordova & Connie Wang, *Empirical Evidence of Drug Pricing Games—A Citizen's Pathway Gone Astray*, 20 STAN. TECH. L. REV. 39, 42 (2017) [hereinafter Feldman, *Citizen's Pathway Gone Astray*]; see also Feldman, *Drug Wars*, *supra* note 2, at 536–38.

⁴ See Feldman, *Drug Wars*, *supra* note 2, at 538–39.

⁵ *Id.* at 503 n.23 (highlighting examples of the revenue generated by blockbuster drugs).

search for new pathways of blocking competition.⁶ Thus, in order to keep the generic system on track, it is critical to expose the various avenues of generic delay.

Part I of this Note briefly describes the generic entry process as prescribed by the Hatch-Waxman Act. Part II details four well-known tactics used by brand-name manufacturers to block or delay the entry of generic competition, highlighting how the tactics are successful. Part III concludes by examining the nature of the various problems and arguing that the first step towards ending the different forms of anticompetitive behavior is through increased disclosure requirements.

II. THE HATCH-WAXMAN SYSTEM

Since 1984, the United States prescription drug market has been governed by the Drug Price Competition and Patent Term Restoration Act, more commonly known as the Hatch-Waxman Act.⁷

A. *Before the Hatch-Waxman Act*

Prior to 1984, a pharmaceutical manufacturer that sought to sell a new prescription drug looked to the 1962 Kefauver-Harris Amendments to the Food, Drug, and Cosmetic Act (FDCA) for guidance, the most significant piece of federal legislation affecting the pharmaceutical market at the time.⁸ Giving power to the Food and Drug Administration (FDA) to require pharmaceutical manufactures to prove that their drugs were safe and efficacious,⁹ the Kefauver-Harris Amendments thrust the FDA into the gatekeeper role responsible for verifying the effectiveness of new prescription drugs.¹⁰ From the requirements of multiple premarket clinical

⁶ See Feldman, *Citizen's Pathways Gone Astray*, *supra* note 3, at 43.

⁷ Pub. L. No. 98-417, 98 Stat. 1585 (1984).

⁸ Aaron S. Kesselheim & Jonathan J. Darrow, *Hatch-Waxman Act Turns 30: Do We Need a Re-Designed Approach for the Modern Era?*, 15 *Yale J. Health, Pol'y, L. & Ethics* 293, 297 (2015).

⁹ See S. Rep. No. 87-1744 (1962).

¹⁰ Kesselheim, *supra* note 8, at 298.

trials of the drug¹¹ to the submission of a New Drug Application (NDA) following a successful clinical trial process,¹² the FDA's approval procedure created an expensive endeavor for any pharmaceutical manufacturer looking to sell a new prescription drug.¹³

While the FDA's process ensured the safety of new drugs, from a competition perspective, the process had a significant flaw: generic manufacturers could not easily enter the market once a drug's patent expired. Because the full clinical trial process was also applicable to any new generic prescription, it resulted in significant investment for a generic manufacturer to bring its own drug to market.¹⁴ Further, courts failed to recognize the experimental use defense to patent infringement liability with respect to pharmaceuticals.¹⁵ By requiring generic manufacturers to either wait until the patents on the brand-name drug expired before starting the clinical trial process or risk liability by conducting clinical trials during the term of the patent,¹⁶ the courts had effectively extended the exclusivity periods for brand-name manufacturers, dampening the market for generics even further.¹⁷ By the late 1970s, about 150 brand-name drugs lacked generic counterparts despite being off-patent, with generics accounting for only nineteen percent of all prescriptions.¹⁸

¹¹ Part 130—New Drugs: Procedural and Interpretive Regulations; Investigational Use, 28 Fed. Reg. 179 (Jan. 8, 1963) (codified at 21 C.F.R. pt. 130.3).

¹² Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 335(b) (2021).

¹³ See Kesselheim, *supra* note 8, at 298.

¹⁴ *Id.*

¹⁵ *Id.* at 299.

¹⁶ See *Roche Prods., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858, 863 (Fed. Cir. 1984) (holding that pre-expiration testing of patent-protected brand-name drugs was not covered under any experimental use defense to liability for infringement because of the definite, cognizable, and not insubstantial commercial purposes of Bolar's actions); see also *Pfizer, Inc. v. Int'l Rectifier Corp.*, 545 F. Supp. 486 (C.D. Cal. 1980) (rejecting the use of patented doxycycline tablets without authorization of the patent holder for purposes of gaining FDA approval).

¹⁷ See Kesselheim, *supra* note 8, at 300.

¹⁸ *Id.*; see also Gerald J. Mossinghoff, *Overview of the Hatch-Waxman Act and Its Impact on the Drug Development Process*, 54 FOOD & DRUG L.J. 187, 187 (1999).

B. Background and Goals of the Hatch-Waxman Act

It is against this backdrop that the Hatch-Waxman Act came into force. Looking to bolster both the brand-name and generic drug industries, the Hatch-Waxman Act intended to make low-cost generics more widely available while—arguably more important—maintaining proper incentives for innovation.¹⁹ To achieve this end, the Act contained four major subcategories of provisions:

(1) creation of a separate abbreviated FDA approval pathway for generic drugs proven to be pharmaceutically equivalent and bioequivalent to their brand-name counterparts; (2) a system to adjudicate generic manufacturers' challenges to brand-name drug manufacturers' market exclusivity; (3) assurance of competition-free periods for innovative drug approvals; and (4) extensions of brand-name market exclusivity.²⁰

Title I of the Hatch-Waxman Act eliminated the long and expensive clinical trial requirement for generic manufacturers looking to launch new generics on the market, instead creating the Abbreviated New Drug Application (ANDA) pathway: the formalized and expedited system granted FDA approval upon proof that the generic drug was both pharmaceutically equivalent and bioequivalent to the brand-name counterpart.²¹ By allowing generic manufacturers to focus on making their drugs as inexpensively and high-quality as possible, the clear intention of the Act was to lower drug prices for consumers.²² Additionally, the Act eliminated brand-name manufacturers' ability to sue for patent infringement while generic manufacturers tested their drugs for bioequivalence before the expiration of the brand-name

¹⁹ See Kesselheim, *supra* note 8, at 301; see also Alfred B. Engelberg, *Special Patent Provisions for Pharmaceuticals: Have They Outlived Their Usefulness?*, 39 IDEA 389, 389 (1999).

²⁰ See Kesselheim, *supra* note 8, at 301.

²¹ Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98-417, § 101, 98 Stat. 1585, 1585-92 (1984) (codified as amended at 21 U.S.C. § 3550) (2012)).

²² H.R. REP. NO. 98-857(11), at 29-32 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2686, 2713-16.

manufacturers' patent, allowing for ANDAs to be prepared and submitted to the FDA without additional delay.²³

The second requirement of the Act—legal certification regarding the status of the patents protecting the brand-name drug—created a system where generic manufacturers could challenge brand-name manufacturers' patents.²⁴ Known as a “Paragraph IV” certification, a generic manufacturer seeking to market its drug must certify with the FDA that its version does not infringe the patents of the brand-name drug, or that the brand-name drug's patents are invalid.²⁵ Interestingly, an ANDA submission containing a Paragraph IV certification is deemed an act of patent infringement statute, giving the brand-name manufacturer forty-five days to initiate a lawsuit for alleged infringement.²⁶ If initiated, the brand-name manufacturer's lawsuit generates an automatic thirty-month stay of the ANDA proceeding, preventing the generic drug from obtaining FDA approval.²⁷ If patent litigation is not completed by the end of the thirty months, the generic manufacturer becomes eligible again to obtain FDA approval, albeit at risk depending on the outcome of the litigation.²⁸ Upon a successful determination that the brand-name manufacturer's patents are invalid or not infringed, the generic manufacturer is awarded a six-month period of market exclusivity, the key incentive that promotes generic manufacturers to challenge brand-name manufacturers' patents.²⁹

While the Hatch-Waxman Act incentivized the challenging of brand-name manufacturers' patents by the granting of the six-month period of market exclusivity for a successful challenger, it still provided assurance that brand-name manufacturers would enjoy

²³ 35 U.S.C. § 271(e)(1) (2012).

²⁴ See Kesselheim, *supra* note 8, at 302–03.

²⁵ *Id.* at 303.

²⁶ 35 U.S.C. § 271(e)(2) (2012).

²⁷ 21 U.S.C. § 355(j)(5)(B)(iii) (2012).

²⁸ *Id.*

²⁹ § 355(j)(5)(B)(iv); see Kesselheim, *supra* note 8, at 304.

guaranteed minimum periods of exclusivity.³⁰ By mandating that the ANDA process for specific types of pharmaceuticals called new molecular entities (NMEs)³¹ not start until five years after FDA approval of the NME, the Act guarantees manufacturers—even without a patent—at least the five years of market exclusivity to recoup research and development costs and obtain profits.³² For non-NME pharmaceuticals, like applications for new uses or new formulations of previously approved drugs, the manufacturers receive three years of market exclusivity.³³ Coupled with the thirty-month stay on Paragraph IV certifications, most NMEs can expect at least seven-and-a-half years of market exclusivity while other non-NME pharmaceuticals can expect at least five-and-a-half years of market exclusivity.³⁴

To further incentive new development by brand-name manufacturers, Title II of the Hatch-Waxman Act grants “patent term restoration” to approved pharmaceuticals, additional time that is added to the term of the patent to account for the time lost during the clinical testing phases and FDA review period.³⁵ By calculating the time between the various filings with the FDA and the time during which the FDA reviewed the NDA, the patent term is extended accordingly.³⁶ Overall, the brand-name manufacturer can extend the patent term for a maximum of fourteen years from the date of the drug’s FDA approval, depending on the length of the approval process.³⁷

³⁰ See Kesselheim, *supra* note 8, at 305.

³¹ A new molecular entity is a pharmaceutical that contains active parts that have not previously been approved by the FDA. *Id.*

³² *Id.*; 21 U.S.C. § 355(j)(5)(F)(ii) (2012).

³³ § 355 (j)(5)(F)(iii).

³⁴ § 355 (j)(5)(F)(ii).

³⁵ See 35 U.S.C. § 154(a) (2012). Because the patent term today runs twenty years from the date of filing the patent application, a large portion of the patent term is lost when brand-name manufacturers seek to bring a new drug to market. See Kesselheim, *supra* note 8, at 306.

³⁶ 35 U.S.C. § 156(c)(2).

³⁷ § 156(c)(3) & (g)(6).

In sum, by providing a method for generic manufacturers to challenge brand-name manufacturers' patents and by providing for a six-month period of exclusivity in certain circumstances for the first generic company to file for FDA approval, the Hatch-Waxman Act greatly incentivized generic drug competition. Today, approximately 90% of all prescribed non-biologic³⁸ drugs are generics, with the average generic costing upwards of 90% less than its branded counterpart.³⁹ Considering these numbers, it is easily said that the Hatch-Waxman Act directly contributed to a revolution in United States pharmaceutical markets, transforming the environment from a brand-name dominated market in the early 1980s to the present day where the vast majority of prescriptions are filled by generic drugs.

III. TACTICS FOR DELAY

By greatly incentivizing generic drug competition in the pharmaceutical industry, the obvious goal of the Hatch-Waxman Act is to lower prescription drug prices. Because the entry of a generic greatly reduces the price of the brand-name counterpart, brand-name manufacturers stand to lose billions of dollars whenever a generic manufacturer seeks to challenge their patents through Paragraph IV certifications.⁴⁰ Not surprisingly, this has led brand-name manufacturers to try everything and anything to get the competitive, or what some might say, anticompetitive, edge: pay-for-delay, citizen petitions, product hopping, and "authorized" generics are all

³⁸ Non-biologic drugs are those composed of small molecules made from chemicals in a lab. Conversely, biologic drugs are those composed of large molecules produced in living organisms. See Feldman, *Captive Generics*, *supra* note 1, at 384.

³⁹ *Id.*; *Implementation of the Generic Drug User Fee Amendments of 2012 (GDUFA): Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 1 (chart 1) (2016) (statement of Janet Woodcock, Dir., Ctr. for Drug Evaluation & Rsch., U.S. Food & Drug Admin.).

⁴⁰ See Feldman, *Captive Generics*, *supra* note 1, at 384–85. It has been estimated that brand-name manufacturers lose out on over \$1 trillion in revenue over the course of a decade. See Evan Hoffman, *Competitive Dynamics of the Generic Drug Manufacturing Industry*, 52 BUS. ECON. 68, 69 (2017).

strategies employed by brand-name manufacturers to keep generic competitors out of the market for as long as possible.⁴¹

A. Pay-for-Delay

The first, and rather simple, tactic employed by brand-name pharmaceutical manufacturers is to “pay” the generic manufacturer to abstain from releasing the generic drug onto market. Known as “pay-for-delay” agreements, by offering the competing generic manufacturer something of value in exchange for a promise to not enter the market, the brand-name manufacturer essentially pays off the competition to maintain its exclusive position in the market.⁴² From the generic manufacturer’s viewpoint, pay-for-delay agreements are mutually advantageous. By receiving an immediate financial benefit—while also avoiding costly patent infringement litigation—the generic manufacturer receives an instantaneous and sizable return while avoiding significant costs in the process.⁴³ Further, depending on the agreement, the generic manufacturer may still retain most of the benefits granted by the Hatch-Waxman scheme.⁴⁴

Because both the generic and brand-name manufacturers stand to gain in pay-for-delay agreements, it is not hard to see why the agreements are successful. A simple example underscores this point: take an agreement in which the generic manufacturer is compensated in

⁴¹ See Feldman, *Captive Generics*, *supra* note 1, at 385. The result on drug prices has been felt by consumers: based on analysis of Medicare patients, it was found that the average dosage-unit price of common brand-name drugs increased by 313% between 2010 and 2017, even accounting for rebates. See Robin Feldman, *The Devil in the Tiers*, 8 J.L. & BIOSCIENCES 1, 19 (2021).

⁴² See Robin Feldman, *The Pricetag of “Pay-for-Delay”*, 23 COLUM. SCI. & TECH. L. REV. 1, 4 (2022) [hereinafter Feldman, *Pricetag*]. See generally C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1153 (2006).

⁴³ See Feldman, *Pricetag*, *supra* note 42, at 10.

⁴⁴ *Id.*

exchange for the promise not to file a Paragraph IV certification with the FDA.⁴⁵ Assuming there is not a second generic manufacturer looking to file with the FDA during the term of delay, the generic manufacturer still maintains the 180-day first-to-file market exclusivity period when it does enter the market at the expiration of the pay-for-delay agreement.⁴⁶ Thus, not only does the generic manufacturer reap the rewards of the first-filer status under the Hatch-Waxman regime, but it also is able to cash in on a serious payday in the meantime.⁴⁷

Normally, payments in exchange to refrain from entering a given market are considered clear antitrust violations.⁴⁸ However, when one party to the agreement holds a valid patent, the analysis is different: patent holders generally have a “lawful right to exclude others from the market” until the patent expires, thus exempting the patent holder from antitrust scrutiny.⁴⁹ Free from the fear of antitrust scrutiny, the law prior to 2013 enabled brand-name manufacturers—who almost always held patents over their drugs—with the freedom to negotiate agreements with generic manufacturers, ensuring they remained the sole supplier in the given market. However, in 2013, the legal landscape surrounding pay-for-delay agreements and patent holders changed when the Supreme Court weighed in on the issue.⁵⁰

⁴⁵ It is important to note that the deal set out in this example highly is simplified. In reality, pay-for-delay agreements are structured in much more complex ways. Straight money in exchange for a promise to not enter the market faces significant legal obstacles, which are later discussed in this section.

⁴⁶ *Id.*

⁴⁷ Additionally, because the generic manufacturer still maintains its 180-day first-filer market exclusivity period during the term of the pay-for-delay agreement, it can be argued that a bottleneck is created for any subsequent generic manufacturers, further disincentivizing additional generic entry into the market. *Id.*

⁴⁸ *Id.* at 12; *see also* 15 U.S.C. §1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

⁴⁹ *FTC v. Actavis, Inc.*, 570 U.S. 136, 146 (2013) (quoting *FTC v. Watson Pharms., Inc.* 667 F.3d 1298, 1307 (11th Cir. 2012), *rev'd and remanded sub nom.* *FTC v. Actavis, Inc.* 570 U.S. 136 (2013)). This view is not without critics: because both the brand-name and generic manufacturer hold direct control over the market for a particular drug, with the powerless consumer bearing the cost, some commentators have argued that pay-for-delay settlements are clear infringements of Section I of the Sherman Act and should be consider a form of illegal monopolization. *See Hemphill, supra* note 42, at 1596.

⁵⁰ *See FTC v. Actavis, Inc.* 570 U.S. 136 (2013).

In addressing whether pay-for-delay agreements are contestable under antitrust principles, even when one party is the holder of a valid patent, the Supreme Court opened the door in *FTC v. Actavis, Inc.*⁵¹ After filing a New Drug Application in 1999, Solvay Pharmaceuticals, a brand-name manufacturer, received FDA approval in 2000 to sell AndroGel, its brand-name topical testosterone drug. A patent over the drug was later obtained in 2003, granting the company exclusive rights set to expire in 2021.⁵²

It was not long until Solvay faced threat of competition: Actavis, Inc., Paddock Laboratories, and Par Pharmaceuticals—all generic manufacturers—each filed their own Abbreviated New Drug Applications with the FDA in 2003, the same year Solvay received patent protection over its branded drug.⁵³ In standard Hatch-Waxman fashion, Solvay initiated Paragraph IV litigation against the generic manufacturers, triggering the thirty-month stay in the generic approval process. Rather interestingly, after the thirty-month stay expired in 2006, but before the Paragraph IV patent litigation ended, Solvay settled with the generic manufacturers.⁵⁴ With each generic manufacturer agreeing to promote Solvay's brand-name drug in exchange for a yearly cash payment, the settlements were structured as mere marketing contracts.⁵⁵ However, each settlement contained a key condition: each manufacturer was not to release its generic drug into the market.⁵⁶

⁵¹ *Id.*

⁵² *Id.* at 145.

⁵³ *Id.* at 144.

⁵⁴ *Id.* Following the expiration of the thirty-month stay in the generic approval process in 2006, Actavis's generic had been approved by the FDA. Had Solvay's patent been found to either be invalid, unenforceable, or not infringed, Actavis would have been free to launch its generic into the market. Thus, given that the IV Paragraph patent litigation was still in progress and Solvay's status as sole manufacturer of AndroGel was in jeopardy, Solvay faced great pressure to settle. *See id.*

⁵⁵ *Id.* at 145. Specifically, Actavis agreed to not enter the market with its generic until August 31, 2015—just shy of five-and-a-half-years before Solvay's patent expired—and to promote Solvay's AndroGel to doctors in exchange for \$19 million to \$30 million per year for nine years. Paddock Laboratories agreed to not enter the market and to promote AndroGel for \$12 million per year, and Par Pharmaceuticals agreed to not enter the market and to promote AndroGel for \$60 million per year. *Id.*

⁵⁶ *Id.*

In response to the settlement, in January 2009, the FTC launched a lawsuit against Solvay, Actavis, Paddock, and Par, alleging that the companies violated Section 5 of the FTC Act prohibiting unfair or deceptive practices.⁵⁷ In affirming the district court's dismissal of the complaint, the Court of the Appeals for the Eleventh Circuit relied on Solvay's status as a patent holder to conclude it had the lawful right to exclude others from the market until the patent expired.⁵⁸ While the appellate court did apply the law at the time, the Supreme Court did not agree: in a 5–3 decision written by Justice Breyer, the Court of Appeals for the Eleventh Circuit was reversed. Ultimately finding that pay-for-delay settlements are open to antitrust scrutiny,⁵⁹ the majority held that the Rule of Reason test should be employed to determine whether such settlements between brand-name and generic pharmaceutical manufacturers violate antitrust law.⁶⁰ Stressing that it was not necessary for courts to determine whether a patent was valid to assess whether a settlement had anticompetitive effects, the Court clearly articulated that reverse payment settlements were not immune from antitrust scrutiny even when they fell within the scope of the exclusionary potential of the patent.⁶¹ Thus, in holding the way it did, the Supreme Court opened the door to future antitrust allegations against pharmaceutical manufacturers engaging in pay-for-delay agreements.

⁵⁷ *Id.*; see also Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a) (2006) (prohibiting “unfair or deceptive business practices in or affecting commerce”).

⁵⁸ *Id.* at 146. Recall, this is not the norm when it comes to anticompetitive actions taken by businesses. Without the presence of the patent, the settlement reached between Solvay and the three generic manufacturers would be in clear violation of the Sherman Act.

⁵⁹ *Id.* at 147.

⁶⁰ *Id.* at 159. The Rule of Reason formulation is best described in the 1918 *Board of Trade of City of Chicago v. United States* case: “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.” *Board of Trade v. U.S.*, 246 U.S. 231, 238 (1918).

⁶¹ *Actavis*, 570 U.S. at 159.

B. Citizen's Petitions

Brand-name pharmaceutical manufacturers stand to reap sizable gains during their time of market exclusivity. Therefore, at the threat of competition from generic manufacturers, brand-name manufacturers are greatly incentivized to delay competition from entering the market as long as possible, even if that delay is only a couple months.⁶² With pay-for-delay agreements being subject to increased levels of scrutiny, brand-name manufacturers have expanded their arsenal when it comes to gaining a competitive edge through use of citizen's petitions.

Mandated by Congress' passage of the Administrative Procedure Act, citizen's petitions require federal agencies to create formal routes for the public to petition an agency to change, amend, or repeal an agency rule.⁶³ As applied to the FDA—the agency tasked with drug approval—the petitions may “request the Commissioner of Food and Drugs to . . . (issue, amend, or revoke a regulation or order to take or refrain from any other form of administrative action).”⁶⁴ In communicating all the factual and legal grounds for the petition and providing all the relevant information—including environmental and economic impact sections if necessary—the citizen's petition process, in theory, is a useful method for the public to communicate its concerns to the FDA.⁶⁵ However, this process can be, and has been, used for ulterior motives: the stifling of competition via brand-name pharmaceutical manufacturers as “concerned citizens” challenging generic manufacturers' Abbreviated New Drug Applications.⁶⁶ While it can be difficult to distinguish between petitions that raise important and necessary issues from those that

⁶² See Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 43. For example, the top-selling drug in the United States in 2014, Gilead's Hepatitis C Drug, Sovaldi, earned about \$1.98 billion in sales every three months. In the event of a generic competitor, even a modest 10% price drop would be worth \$198 million for three months. *Id.*

⁶³ *Id.*; 5 U.S.C. § 553(e) (2012 & Supp. III 2015).

⁶⁴ 21 C.F.R. § 10.30 (2016).

⁶⁵ See Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 52.

⁶⁶ *Id.* (explaining that the brand-name manufacturer commonly employs a variety of different arguments, ranging from direct attacks against the generic manufacturer's application and its bioequivalence or clinical data to appeals to safety, calls to preserve or add new exclusivities for the brand-name drug, and more).

carry anticompetitive underpinnings, the result is generally beneficial to the brand-name manufacturer: the stopping or delay of approval of the generic manufacturer's drug.⁶⁷

As an example of a questionable citizen's petition, consider one filed by Mutual Pharmaceuticals in 2007. As a generic manufacturer itself, Mutual was the first to receive FDA approval in 2004 to sell its generic version of felodipine, a blood pressure medicine.⁶⁸ Then, in the first quarter of 2007, Mylan, another generic manufacturer, sought FDA approval to sell its own version of generic felodipine.⁶⁹ Only a few months later, Mutual filed a citizen's petition that sought to delay other generic manufacturers from gaining FDA approval for other versions of generic felodipine.⁷⁰ Citing concerns with the current product label, Mutual's petition was based on a 2001 study that examined the effects of certain types of orange juice on the absorption of the drug.⁷¹ Ultimately denying Mutual's petition for the study's failure in raising serious safety concerns, the FDA's response was laced with skepticism towards Mutual's claims, and even towards its motives.⁷²

At face value, Mutual's petition does not appear concerning because it was swiftly exposed and discarded. Relative to the aforementioned pay-for-delay agreements, this seems

⁶⁷ *Id.*

⁶⁸ *Id.* at 53.

⁶⁹ *Id.* It is important to consider that Mylan was the second generic manufacturer to seek approval with the FDA, with the first being Mutual. This meant Mylan was a direct threat to the economic benefits Mutual was feeling after being the first generic to enter the market, also giving Mutual further reasons to be aware of Mylan's filing with the FDA.

⁷⁰ See Letter from Janet Woodcock, Dir. Ctr. for Drug Evaluation & Research, U.S. Food & Drug Admin., to Robert Dettery, Vice President, Regulatory Affairs, Mut. Pharm. Co. (Apr. 17, 2008), <https://www.regulations.gov/document?D=FDA-2007-P-0123-0009> [hereinafter Response].

⁷¹ See Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 52. Rather conveniently, as a currently approved seller of generic felodipine, Mutual would be free to continue selling using the existing labels during the FDA's review process. *Id.*

⁷² See Response, *supra* note 68, at 4. For example, the response commented on how the 2001 study was published well before Mutual's own generic application, yet Mutual claimed to not have become aware of the 2001 until 2007 and there was the threat of competition. *Id.*

trivial at best. One may ask, does the citizen's petition system really pose a serious threat to competition in pharmaceutical markets?

In short, there is more to the citizen's petition process than meets the eye. The denial of Mutual's petition was April 17, 2008, the same date Mylan's generic version of felodipine was approved.⁷³ While it cannot be said for certain, this chain of events strongly suggests that Mutual's petition was one of the last barriers to Mylan's final approval.⁷⁴ Thus, it appears Mutual was successful in delaying the approval of the second generic, and direct competitor, for felodipine through its citizen's petition of questionable merit.⁷⁵

Examining historical trends in the use of citizen's petitions further shines light on the issue, suggesting that petitions like Mutual Pharmaceuticals' are not one-off events. The early 2000s saw an increase in the number of total yearly citizen's petitions, along with the number of petitions that had the potential to delay generic entry into the market.⁷⁶ In 2010, over 20% of citizen's petitions filed had the potential to delay generic entry into the market, with percentages consistently reaching the high teens in preceding and subsequent years.⁷⁷ As to the specific filing time of the petitions in relation to the timeline of the FDA generic drug approval process, the majority were filed less than six months from the date of the generic drug's approval.⁷⁸ Considering that the average length of time from generic filing to approval is about four years,

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ For the effects on cost for consumers, sales of Plendil—the brand-name version of felodipine—still totaled \$251 million in 2017, even with the presence of two generic versions on the market for the majority of year. Thus, the brand-name manufacturer's success in the relative highly competitive market further shows Mutual stood to make millions even by a slight one-month or two-month delay in the approval of the second generic manufacturer. *Id.* at 54. See also Michael Carrier & Daryl Wander, *Citizen Petitions: An Empirical Study*, 34 CARDOZO L. REV. 249, 254 (2012) (detailing a citizen petition delayed the generic version of the depression drug Welbutrin XL by 133 days, which cost consumers roughly \$600 million).

⁷⁶ See Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 71.

⁷⁷ *Id.*

⁷⁸ *Id.* at 75.